Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement?

2. Whether Rule 23 of the Federal Rules of Civil Procedure authorizes the certification of a multi-state class action where individual reliance by each class member is at issue and where the predominance of common issues can be established only by distorting the law of the applicable states?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Paul Bove
Martin I. Cook
George Dalton
Richard P. Durishin
Alberto Gonzalez
G.G.S.K., Inc., d/b/a Trail Exxon
G.G.S.K. 1 d/b/a Northlake Exxon
Lee-Langley Corporation
Robert Lewis, Inc. d/b/a North Stuart Exxon
R. William McGillicuddy
John Pinder
Rylans Enterprises
Williston Center Autocare, Inc.
David Wise

and all similarly situated persons.

Exxon Corporation is now known as Exxon Mobil Corporation. There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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PETITION FOR CERTIORARI

Petitioner Exxon Corporation ("Exxon") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 333 F.3d 1248 (App. 67a-92a). The order of the court of appeals denying the petition for rehearing en banc, accompanied by the dissenting opinion of Judges Tjoflat and Birch, is reported at 362 F.3d 739 (App. 1a-66a). The district court's opinion and order determining that the cause of action for breach of contract could proceed on a classwide basis is reported at 188 F.R.D. 667 (App. 172a-211a), and the district court's order and opinion entering final judgment for the class representatives only, denying the motion to enter final judgment for the class, and certifying the case for interlocutory review is reported at 157 F. Supp. 2d 1291 (App. 95a-156a).

STATUTE AND RULE INVOLVED

28 U.S.C. § 1367 and Federal Rule of Civil Procedure 23 are reproduced at App. 246a-254a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 11, 2003. App. 68a. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on March 15, 2004. App. 2a. Petitioner filed a motion for extension of time with Justice Anthony M. Kennedy on May 10, 2004. Justice Kennedy granted petitioner an extension of time up to and including July 14, 2004, to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

A textbook of Supreme Court practice could use this case to illustrate many of the "compelling reasons" to grant a petition for certiorari listed in Supreme Court Rule 10. The initial question presented is whether in a class action, federal courts with diversity jurisdiction over the claims of named class representatives also have supplemental jurisdiction, 28 U.S.C. § 1367, over the claims of class members who fail to meet the amount-in-controversy requirement of § 1332. This Court previously granted review to resolve the enduring conflict among the courts of appeals over this question, but the Court divided evenly and was unable to reach a decision. Currently, five courts of appeals hold that § 1367 extends supplemental jurisdiction to unnamed class members who do not satisfy the amount-in-controversy requirement, while three courts of appeals reject this interpretation of § 1367, holding that Congress's contrary intent is clear. This conflict also results in a split concerning the continuing validity of *Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973), which holds that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."

The question presented here recurs frequently, and the importance of a prompt resolution and a uniform interpretation of § 1367 is universally acknowledged. A significant portion of the federal judiciary necessarily is exercising jurisdiction that it does not have or refusing to exercise jurisdiction that Congress has conferred. And, because the scope of diversity jurisdiction is at stake, courts wrongly exercising supplemental jurisdiction are intruding on a state realm. Finally, because this case arises in the class-action context, the persistent conflict results in forum shopping by plaintiffs seeking the most favorable jurisdiction and in fundamental unfairness to defendants subjected to the inequitable administration of law.

The second question presented also raises issues of broad importance. The basic question is whether a multi-state class lawfully can be certified in a diversity case under Federal Rule of Civil Procedure 23(b)(3) where, as here, the court is required to ignore or distort applicable (and varying) individual state laws in order to create "common" issues of liability that can be litigated on a classwide basis. This case exemplifies a spreading and deeply serious problem in the nation's judicial system: the certification of massive, multi-state classes asserting claims that, if asserted individually, would be governed by differing state laws and would be subject to individual factual inquiries, including individualized defenses to each claim. Such orders not only violate Rule 23, they also run afoul of the basic due process principle that each party – plaintiff and defendant alike – shall have his or her own day in court. Rule 23, to be sure, exists to facilitate the classwide litigation of claims on a representative basis, but only where the claims and defenses truly common to every claimant will predominate in the litigation. Predominance of common issues cannot be manufactured – by, for example, disregarding or altering state laws that demand individualized inquiries – for the purpose of facilitating classwide adjudication.

This point follows directly from the terms and history of Rule 23, but it is a point to which courts appear to be increasingly insensitive, as they seek to force complex economic and social problems into the "efficient" device of all-or-nothing class litigation. Of course, what courts *really* are seeking in many such cases is not litigation, but a judicially-engineered settlement that "fairly resolves" the dispute. But what results is typically not efficient and fair, but instead quick and dirty. Here, Exxon did *not* acquiesce in an unfair settlement driven by the unjust class certification, but saw the case through a trial governed by theories of relief and rules of law invented to make a class action possible. The result was a jury verdict of classwide liability even more

unfair than an artificial classwide settlement would have been. As wrong as the result here may be, it is striking because a trial was actually held. Often, defendants cannot afford the risk Exxon assumed here, and for which it will wrongly pay, unless the Court clarifies the proper meaning and application of Rule 23(b)(3) in diversity cases involving multi-state classes.

STATEMENT OF THE CASE

1. Plaintiffs here represent a class of approximately 10,000 current and former Exxon motor fuel dealers. They allege that in 1982 Exxon initiated a marketing program known as the Discount for Cash ("DFC") program and that in administering that program, Exxon overcharged them for wholesale motor fuel purchases between March 1, 1983 and August 31, 1994. Plaintiffs characterize these overcharges as breaches of Exxon's agreements with its dealers. App. 69a.

Each Exxon dealer operates under a separate contract (called a "Sales Agreement") with Exxon. App. 69a, 223a. Each Sales Agreement contains an open-price term, under which the individual dealer is obligated to pay Exxon's "established dealer price" at the time of delivery. Sales Agreement, art. 4; App. 88a & n.16. There is no national dealer price; instead, Exxon establishes the wholesale price for individual dealer sales by continually evaluating market conditions to estimate the wholesale prices charged by Exxon's competitors in each local market. As a result, dealer prices vary from market to market; and, because they are estimates, they can be below, at, or above the "true" wholesale market price for any given dealer at any given time.

The DFC program was a response to competitive pressure from companies that did not offer credit cards and thus did not incur fees associated with credit card payment. App. 69a. It was intended to encourage Exxon dealers to implement a

price structure that would, in turn, encourage retail customers to use cash rather than a credit card to pay for motor fuel, by charging customers using cash a few cents less than customers using credit cards. *Id.* Under the DFC program, Exxon changed its pricing system so that dealer prices were set in each market by reference to the local wholesale "cash" price (rather than the credit price), charged dealers a 3% processing fee on all credit card sales, and urged (but did not require) dealers to establish a two-tiered retail price structure, offering a discount to customers paying cash. *Id.* No Sales Agreement mentions the DFC marketing program.

2. In May 1991, the dealers filed a class action against Exxon in federal district court; the stated basis for federal court jurisdiction was diversity of citizenship under 28 U.S.C. § 1332. The dealer class alleged that the DFC program created a contractual obligation for Exxon to offset the mandated credit card fees by reducing wholesale gasoline prices "on average" for the class "as a whole" – not for each individual dealer. The class alleged that this contractual obligation was imposed under the dealers' individual Sales Agreements, even though the Sales Agreements do not refer to any such price reduction. The class further asserted that under the DFC program, Exxon reduced the wholesale price by 1.7 cents per gallon for six months, but stopped providing this reduction in March 1983 without informing its dealers. The dealers claimed that by ceasing to reduce wholesale prices to offset the 3% credit card fee, Exxon breached its contractual obligation to the class as a collectivity and, "on average," overcharged the dealers for gasoline during the class period. App. 109a-110a, 161a.

Plaintiffs sought class certification. Exxon opposed the motion on the grounds that the varying circumstances of each dealer's sales – including regional variations in market and pricing conditions – as well as individual dealer reliance on alleged representations, individual damages determinations, and the existence of individualized affirmative defenses,

made certification impermissible under Rule 23(b)(3). The magistrate judge rejected Exxon's arguments, applying a presumption in favor of class certification, App. 238a ("in doubtful cases or when a question exists, the benefit of the doubt should sway in favor of certifying the class"), and stating that "[i]f the liability issue is common to the class, common questions are held to predominate over individual questions," *id.* at 235a (internal quotation marks omitted). The magistrate judge recommended certification of a class of all dealers who were party to a Sales Agreement at any time during the DFC program, *id.* at 238a, and the district court affirmed that recommendation, *id.* at 220a.

Exxon also asserted that the court lacked jurisdiction over class members who did not satisfy the requirements of § 1332. The district court rejected this argument and held that it had jurisdiction over all class members under § 1367. App. 212a-214a.

After certification, the case was tried to a hung jury in September 1999. It was retried in January 2001, resulting in a jury verdict in favor of the dealer class. The jury found that Exxon was *not* "[r]equired to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee." App. 161a, 163a. Instead, the jury found that Exxon had a contractual obligation to reduce prices "on average" to the class as a whole. *Id.* at 161a, 162a.

The district court denied Exxon's post-trial motions seeking to overturn the verdict, and awarded pre-judgment interest and compensatory damages. App. 155a-156a. The court later entered final judgment under Rule 54(b) *for the named class representatives* based on a computation of the "on average" damage figure. *Id.* at 93a-94a. The court denied, however, the dealers' motion for entry of a final judgment with respect to the class. The court concluded that it could not enter an aggregate damages award because the jury had not awarded aggregate damages, and therefore that final judgment could

be entered only for the class representatives. *Id.* at 155a. The court established an ad hoc claims process through which Exxon could contest individual class members' claims for compensatory damages. *Id.*

The court also certified the case for interlocutory review under 28 U.S.C. § 1292(b), asking the court of appeals to resolve the following substantial questions: "(1) whether [the court] properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process." App. 68a.

3. The Eleventh Circuit affirmed the district court order. First, it addressed whether the district court had supplemental jurisdiction over the claims of class members who failed to meet the minimum amount-in-controversy requirement of § 1332(a). The court recognized that the issue "has been the subject of considerable debate among our sister circuits, which have split on the issue." App. 71a-72a (citing cases). Relying on the plain language of the supplemental jurisdiction statute, the court held that § 1367 authorizes a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount-in-controversy requirement. *Id.* at 72a-74a. In so doing, it joined four Circuits, and disagreed with three others. *Id.* at 71a-72a.

The court next affirmed the district court's refusal to enter an aggregate judgment for the dealers based on the jury verdict. App. 79a. The court acknowledged that "the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled." *Id.* at 78a. The court found several obstacles to issuance of an aggregated judgment, including (a) the dealers who had opted out of the suit or

failed to submit claims; (b) the dealers whose claims were barred by the Ohio statute of limitations; (c) the awarding of prejudgment interest whose rate varies from state to state; and (d) Exxon's right to set off against the claims of some dealers. *Id.* at 79a. In light of the determinations to be made in the individual claims process, moreover, the court affirmed Exxon's right to participate in the claims process and to raise its claims of entitlement to set-offs. *Id.* at 80a, 83a.

Finally, the court affirmed the certification of the class under Rule 23(b)(3). The court rejected Exxon's arguments that "there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses." App. 85a. The court held that because the dealer agreements were "materially similar and Exxon purported to reduce the price of wholesale gas for all dealers," its "duty of good faith was an obligation that it owed to the dealers as a whole." *Id.* Moreover, while the court recognized that there were numerous individualized damages issues that potentially required 10,000 hearings to resolve, the court held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Id.* at 86a.

4. Exxon filed a petition for rehearing and rehearing en banc, which the Court denied. Judge Tjoflat, joined by Judge Birch, dissented from the denial of rehearing on the question whether the district court, with jurisdiction under § 1332, had the power to exercise supplemental jurisdiction over unnamed class members who failed to meet the amount-in-controversy requirement for federal diversity jurisdiction.

To recapitulate the dissenting opinion is to state the case for this Court's review of the issue. After providing the relevant background and context, Judge Tjoflat first demonstrates that "the circuit courts of appeals – indeed, the entire federal judiciary – is deeply divided over this issue." App. 9a. He explains that "five federal appellate courts are of the opinion that unnamed plaintiffs may invoke supplemental jurisdiction

in diversity-based class actions without satisfying § 1332's amount-in-controversy requirement, while three courts adhere to the opposite conclusion." *Id.* at 14a. The conflict in the courts of appeals is mirrored in "confusion and disarray" in the results and reasoning of district courts and among commentators. *Id.* at 16a-24a & nn.10-16 (citing extensive authority). He concludes that "[i]f the Supreme Court does not grant certiorari in this case, appellate courts, district courts, commenters, and attorneys will simply continue to talk past each other, deploying an unbelievably wide array of interpretative canons to reach radically divergent conclusions." *Id.* at 24a.

The dissent next argues that the scope and meaning of § 1367 present critically important questions of federal jurisdiction. "Whatever the ultimate merits of the § 1367 issue, the fact remains that a large number of courts – unelected judges who are not democratically accountable – are either abdicating or abusing their authority; maintenance of such a status quo is intolerable." App. 28a. And, Judge Tjoflat points out, the proper interpretation of § 1367 has already affected numerous cases and "hundreds of thousands, if not millions of people, corporations, and other businesses, and promises to continue to do so well into the future," *id.* at 34a. Further, the dissent demonstrates, uniformity is important in this setting, both to prevent plaintiffs from forum shopping and to ensure the fair enforcement of the important right to be heard in federal court. *Id.* at 45a-47a.

Finally, the dissent observes that this Court has already given a significant indication that it considers the issue presented worthy of review, because it previously granted a petition to address the question. App. 49a (citing *Free* v. *Abbott Labs.*, 529 U.S. 333 (2000) (per curiam)). The Court, however, divided evenly and was unable to reach a decision.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS AN IMPORTANT, RECURRING QUESTION OF FEDERAL JURISDICTION ON WHICH THE CIRCUITS ARE DEEPLY AND STEADFASTLY DIVIDED.

The first issue presented is whether § 1367 authorizes federal district courts exercising diversity jurisdiction to assert supplemental jurisdiction over unnamed plaintiffs in class actions who fail to satisfy § 1332's amount-in-controversy requirement. Put differently, the issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." 414 U.S. at 301. This issue is the subject of a broad, established conflict among the courts of appeals on an important, recurring question of federal law that has not been settled by this Court and that has been decided by the court below in a way that arguably conflicts with decisions of this Court. This Court's intervention is necessary to determine the proper scope of federal court jurisdiction and to ensure the uniform, fair administration of justice among the federal courts. Indeed, the Court has previously determined that this issue warrants its attention by granting the petition for certiorari to address it in *Free*, 529 U.S. at 333, and then dividing evenly and failing to resolve the conflict. Today, the conflict is even broader than in 2000 and the Circuits' inconsistent positions have hardened into established law.

A. The Courts Of Appeals Are Deeply Divided.

"No issue facing federal circuit courts of appeals today has generated as deep and abiding a schism as the question of supplemental jurisdiction under § 1367." App. 13a-14a. Five circuits have now held that district courts exercising diversity jurisdiction over a class action may exert supplemental jurisdiction over unnamed class members who do not satisfy

§ 1332's amount-in-controversy requirement. Three circuits have held that such jurisdiction remains precluded. Circuits concluding that § 1367 extends supplemental jurisdiction to the claims of unnamed class members rely almost exclusively on what they perceive to be § 1367's "plain language." See *id.* at 14a-15a; *Rosmer* v. *Pfizer Inc.*, 263 F.3d 110, 117 (4th Cir. 2001); *Gibson* v. *Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001); *Stromberg Metal Works, Inc.* v. *Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir. 1996); *Free* v. *Abbott Labs.*, 51 F.3d 524, 528 (5th Cir. 1995). The other courts of appeals determined that the language requires the contrary result or is at least ambiguous, requiring resort to the legislative history which unambiguously demonstrates that Congress did not intend to alter *Zahn*. See *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998); *Meritcare Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 (3d Cir. 1999); *Trimble* v. *Asarco, Inc.*, 232 F.3d 946, 961-62 (8th Cir. 2000). As these citations reveal, the conflict that existed when this Court agreed to hear *Free* has only deepened.

In addition, the decision below (like those of four other circuits) is in substantial tension with *Zahn*. The court below held that Congress legislatively overruled *Zahn*, though the statute does not address diversity-based class actions and the legislative history explicitly declares that Congress intended to preserve *Zahn*. See *infra* at 18. The question whether a decision of this Court has been overruled *sub silentio* now divides the lower courts and is worthy of this Court's attention.

Finally, the endurance and depth of the circuit conflict is reflected in the magnitude and varying perspectives of the legal literature. The conflict is recognized in the three most prominent treatises of federal civil procedure and federal courts jurisdiction, see 5 James Wm. Moore, *Moore's Federal Practice* § 23.07[3][c], at 23-47 (3d ed. 2003); Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.); Richard H. Fallon, et al., *Hart & Weschler's The Federal*

Courts and the Federal System 926-930, 1490-93 (5th ed. 2003). There is no current prospect of a uniform interpretation of § 1367 without this Court's intervention.

B. The Issue Is Recurring And Important.

There are thousands of class actions pending (as of 2003, 4,977), and numerous class actions are filed in federal district courts every year. In 2003, 266 of the new class actions filed were based on diversity jurisdiction.[1] There can be no doubt that the application of § 1367 to unnamed class members who do not satisfy the amount-in-controversy requirement will recur. Indeed, the number of cases addressing the issue since the passage of the supplemental jurisdiction statute in 1991 proves the point. And, as the dissent below persuasively demonstrates, the number of people affected is in the "hundreds of thousands," and vast amounts of money are at stake. See App. 35a-36a, 38a-39a.

The importance of the issue is similarly beyond dispute. A persistent conflict about the scope of the jurisdiction of the federal courts is intolerable for several reasons. First, federal courts are courts of limited jurisdiction, and these limits, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). In petitioner's view, federal courts are exercising jurisdiction that they do not have in five federal circuits; in respondents' view, federal courts are wrongfully refusing to exercise jurisdiction they have in three federal circuits. From either viewpoint, a congressional delineation of federal court jurisdiction is being violated in a substantial portion of the federal system. See App. 28a ("[w]hatever the ultimate merits of the § 1367 issue,

[1] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 14, 2004). For the cited statistics, see Tables X-4 and X-5 of the 2003 Report.

the fact remains that a large number of courts – unelected judges who are not democratically accountable – are either abdicating or abusing their authority"). The clear demarcation of the federal courts' jurisdictional boundaries is at stake in this case.

Second, ascertaining the proper scope of supplemental federal court jurisdiction affects both the separation of powers and our federalism. Jurisdictional limitations ensure that the federal courts do not upset the balance of power among the branches of the federal government by "keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Moreover, in the diversity-jurisdiction setting, federal courts are empowered to adjudicate state law claims – *viz.*, claims that presumptively should be left to state tribunals. See *Speiser* v. *Randall*, 357 U.S. 513, 523 n.7 (1958) (reciting the "basic constitutional principle that the construction of state laws in the exclusive responsibility of the state courts"). In petitioner's view, federal courts in five federal circuits are adjudicating disputes within the exclusive jurisdiction of state courts without any congressional authorization, while in respondents' view, federal courts in three federal circuits are wrongfully "denying [unnamed class members] their right to a federal forum" conferred by Congress in § 1367. App. 30a. The issue presented, accordingly, strikes at the core of our constitutional structure in two important respects.

Third, the ubiquity and importance of § 1367 make conflict and uncertainty in its application intolerable. A lack of uniformity in the interpretation and application of § 1367 is fundamentally unfair to litigants in diversity-based class cases. Neither plaintiffs nor defendants should be denied a federal forum (if that is their preference and right), depending upon whether a nationwide class action is brought in Philadelphia, Denver, New Orleans, or Chicago. The current lack of uniformity simply encourages unseemly forum

shopping by plaintiffs. This problem is particularly acute in the class action setting because plaintiffs often have limitless options as to where to bring the lawsuit. See App. 46a ("plaintiffs' attorneys can essentially cherry-pick . . . a named plaintiff and decide for themselves the district court and circuit in which to file suit"). Because this Court's diversity jurisprudence seeks to "discourage[] forum-shopping and avoid[] inequitable administration of the laws," review to ensure uniformity is uniquely appropriate here. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).[2]

For all of these reasons, this recurring and important issue merits this Court's immediate attention and resolution.

C. The Decision Below Is Wrong.

The decision below is wrong in ways that do violence to Congress's intent, disregard a decision of this Court, and substantially expand the caseload of the federal judiciary.

The panel relied solely on the plain language of the statute in concluding that district courts with diversity jurisdiction

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[2] The Eleventh Circuit's decision logically entails interpreting § 1367 to authorize federal courts to exercise supplemental jurisdiction over the claims of named parties who do not meet the amount-in-controversy requirement, if a single plaintiff satisfies § 1332. *See* App. 43a (explaining that the Eleventh Circuit's interpretation "'could lead to a finding of federal jurisdiction for an entire multi-party action where diversity only existed between two parties'") (citation omitted). This, in turn, would effect a dramatic expansion in the right of removal. *Id.* ("[u]nder the panel's interpretation of § 1367, a significant number of cases that would not have been removable to federal court, due to the involvement of parties who did not satisfy § 1332's requirements, may now be removed"). The reverberations of the conflict in interpreting § 1367 will echo through federal-jurisdiction jurisprudence, exacerbating the fundamental unfairness already present in the lack of uniformity. *See Ortega* v. *Star-Kist Foods, Inc.*, 370 F.3d 124, 132 (1st Cir. 2004) ("[b]ecause the same statutory language applies in both contexts, some courts have lumped the two together for purposes of § 1367") (citing *Meritcare*, 166 F.3d at 218; *Stromberg*, 77 F.3d at 931).

may exercise supplemental jurisdiction over unnamed parties who do not satisfy the amount-in-controversy requirement. The language of the statute is far from plain. In pertinent part, § 1367(a) provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This language is ambiguous with respect to whether district courts have supplemental jurisdiction over the claims of unnamed class members in diversity-based class actions. Most notably, as the dissent below explains (App. 57a-58a), § 1367 invokes the concepts of a district court's "original jurisdiction" over a "civil action." Under established law, the joinder or aggregation of parties and claims has different implications for a court's "original jurisdiction" in federal-question and diversity "civil actions." Under the federal-question statute, a court has original jurisdiction of an action that presents a federal question, and the joinder or aggregation of parties and claims does not affect that "original jurisdiction." In contrast, under the diversity statute, the presence of additional parties or claims can determine whether the court has "original jurisdiction" – *e.g.*, because the parties are not completely diverse or because the claims do not satisfy the amount-in-controversy requirement. A court does not have "original jurisdiction" under § 1332 over a class action filed on behalf of unnamed class members who do not meet the amount-in-controversy requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for exercising supplemental jurisdiction is therefore unsatisfied.

The traditional response to this argument – that the court has jurisdiction over the civil action brought by the named class members who satisfy § 1332 and can therefore exercise supplemental jurisdiction over the claims of unnamed class members who do not — rests on flawed premises. It treats the phrase "civil action" as if it were the word "claim" and it treats a class action as if it were simply a joinder or consolidation of individual claims. In fact, Congress did not say that courts may exercise supplemental jurisdiction whenever any single claim in an action would support original jurisdiction, as the panel would have it. In addition, a class action is a representative suit. See Fed. R. Civ. P. 23; *Hansberry* v. *Lee*, 311 U.S. 32 (1940) (characterizing the class action as a "representative suit"). A federal court does not have original jurisdiction over a class or representative action in which unnamed class members do not satisfy the amount-in-controversy requirement, see *Zahn*; and the court must either alter the class definition to exclude members who do not satisfy the requirement or deny certification to the class (as was done in *Zahn*). Put differently, once the court obtains "original jurisdiction" over a diversity action by dismissing from the suit all parties named and unnamed who do not satisfy the amount-in-controversy requirement, what remains is either (a) a class which, by definition, non-compliant plaintiffs cannot join, or (b) not a class. The supplemental jurisdiction statute authorizes the addition of claims to a civil action – not the creation of a class over which the court lacks original jurisdiction.[3]

Those who argue that § 1367 cannot possibly be interpreted to require a federal court to have "original jurisdiction" over a

[3] In addition, because a class action is a representative action litigated by class representatives "on behalf of all," the claims of unnamed class members are not "other claims" within the meaning of § 1367; indeed, a class action is appropriate only when "joinder of all members is impracticable," Fed. R. Civ. P. 23(a), making clear that the claims of unnamed class members are not claims that are joined or added.

diversity-based class action in order to exercise supplemental jurisdiction over unnamed class members also claim that it renders the statute meaningless. They claim that under such an interpretation, § 1367 would say that a court may only exercise supplemental jurisdiction with respect to claims over which it already has jurisdiction. That is not true. Section 1367(a) allows a court with "original" federal question jurisdiction to exercise supplemental jurisdiction over the federal plaintiff's state law claims and any non-federal counterclaims, cross-claims, and claims by and against intervenors, etc. (subject to § 1367(b)). And, the statute authorizes courts with diversity jurisdiction to exercise supplemental jurisdiction over counterclaims by defendants, cross-claims among plaintiffs, and claims by and against intervenors, etc., (again subject to § 1367(b)).

The plain language argument of the panel is called into question not only by the above interpretation, but also by the improbable consequences of adopting the panel position. Congress has an established policy of restricting diversity jurisdiction, not expanding it, usually by raising the amount-in-controversy bar; and this Court construes diversity jurisdiction narrowly, see *Snyder* v. *Harris*, 394 U.S. 332, 340-41 (1969). It is implausible to think that § 1367 overturned *Zahn* (and *Clark*, as well, if all multiparty litigation in diversity cases is affected by § 1367), and substantially expanded diversity jurisdiction based on this ambiguous statutory language.

Finally, the legislative history of § 1367 makes absolutely clear that Congress did not intend to overrule *Zahn*. The House Judiciary Committee report states that the bill was intended to "essentially restore the pre-*Finley* understandings of the authorization for and limits on . . . supplemental jurisdiction." H.R. Rep. No. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874. With respect to class actions, the bill states:

> The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*. [*Id.* at 29, *reprinted in* 1990 U.S.C.C.A.N at 6875.]

Critically, note 17 cites *Zahn*. See *id.* at 29 n.17, *reprinted in* 1990 U.S.C.C.A.N. at 6875 n.17. The House report was adopted by the Senate Judiciary Committee. See 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990); *id.* at S17578 (statement by bill sponsor Sen. Grassley) (the bill does not "represent major changes in the law"); *id.* at H13313 (statement by bill sponsor Rep. Kastenmeier) (the bill is "noncontroversial").

The legislative history contains no hint of any contrary intent – and certainly the opposite of any intent to expand the established bounds of diversity jurisdiction. See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes").

This Court should grant the petition to resolve the broad and fixed conflict among the courts of appeals about the recurring and important question of the proper scope of federal courts' diversity-based jurisdiction under § 1367.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE MEANING AND PROPER APPLICATION OF RULE 23(B)(3).

Rule 23 is a procedural device of immense importance to the fair and efficient administration of justice in the United States, designed as "'an exception to the usual rule that

litigation is conducted by and on behalf of the individual named parties only,'" *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155 (1982). But precisely because the mass adjudication of claims is such a unique procedure, this Court has emphasized that courts must engage in a "rigorous analysis" of whether a given case satisfies the important prerequisites for invocation of the class action device. *Id.* at 161; see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997) (Rule "'invites a close look at the case before it is accepted as a class action'"). The stakes are high because the costs of the Rule's erroneous application are manifold and severe. On the one hand, absent class members are deprived of their own "day in court," and their rights may be conclusively determined without a fair opportunity for them to litigate and obtain their own remedies. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808-11 (1985); *Hansberry* v. *Lee*, 311 U.S. at 42-43. On the other hand, a defendant forced to defend against claims *en masse* that are not truly common may be denied his due process right to present a full defense against each claim. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982). Perhaps even more important, the "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

Despite the unquestioned significance of the class action procedural tool in modern civil litigation – and the undeniable importance of clarity in the standards governing invocation of the device – there is widespread disagreement and uncertainty in the courts over the proper application of the broad generalities set forth in Rule 23. There is little confusion about the application of four preliminary requirements for class certification of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation). In addition, the courts agree that Rule 23(b)(3)'s requirement that common

issues of law and fact "predominate" over issues affecting class members individually is intended to "test[] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. And, the courts further agree that Rule 23(b)(3)'s instruction that class litigation be "superior" to other methods for fairly and efficiently resolving the controversy is intended to address whether the class action is manageable. *Id.* at 624. At that point, all agreement ends, for the courts are hopelessly divided about the meaning and proper application of the Rule 23(b)(3) criteria.[4]

This case illustrates both the uncertainty about Rule 23(b)(3) and the deleterious consequences of its misapplication. First, the decision deepens a square and acknowledged circuit conflict over the question whether Rule 23 allows class certification when the plaintiffs must prove each class member's individual reliance to establish equitable tolling of a statute of limitations. Second, the decision exemplifies a growing tendency among courts to disregard federal statutes – and key decisions of this Court construing those statutes – requiring courts to apply the federal procedural rules, including Rule 23, so as not to derogate either the substantive rights of the parties or the substantive law of the states from which their rights arise. Finally, uncertainty over Rule 23's requirements inevitably results in frequent and recurring errors, which have practical consequences of the utmost severity, given the inherent nature of the class action device as a liability-magnifier.

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[4] *See* Priya Laroia, *Comment: Individualized Affirmative Defenses Bar Class Certification Per Se*, 2003 U. Chi. Legal F. 805, 807 ("Courts often have muddled the distinctions between the various requirements for certification under Rule 23. Although the Supreme Court has issued decisions indicating the appropriate scope of a certification inquiry, these decisions sometimes have added to courts' questions about the appropriate analysis at the certification stage") (footnotes omitted).

A. The Decision Below Directly Conflicts With Decisions of Other Circuits.

The decision below affirms the certification of a class in this case despite the fact that, *inter alia*, the validity of each class member's individual claim turns on whether he or she personally acted in reliance on statements by Exxon regarding the existence of the DFC program. The issue arises because Exxon has statute of limitations defenses against virtually every class member's claim – defenses that are otherwise indisputably valid, but for the plaintiffs' assertion that Exxon "fraudulently concealed" its termination of the DFC program by stating during dealer meetings that the program was still in existence. Had Exxon not made those statements, plaintiffs contend, each of the class members would have filed suit earlier, within the limitations period applicable in each of their states. The district court held that the need to prove each dealer's reliance would not preclude class certification, App. 187a-189a, but expressly acknowledged that "some courts have reached contrary determinations," *id.* at 189a n.19.

The district court was right in one respect: the courts, including the circuits, are openly divided over the question whether a class may be certified when plaintiffs assert reliance-based equitable tolling and fraudulent concealment theories to defeat a statute of limitations defense. As the Third Circuit has described the conflict:

> The cumulative experience of the judiciary has not been uniform in this regard. Some courts have regarded the issue of concealment to predominate, and have held that class certification is permissible, even though some individual questions are present. Other courts have considered individual questions to be too pervasive to permit it to be handled as a class matter. [*Winoff Indus., Inc.* v. *Stone Container Corp. (In re Linerboard Anti-trust Litig.)*, 305 F.3d 145, 161 (3d Cir. 2002), *cert. denied*, 538 U.S. 977 (2003).]

On one side of the conflict at the Circuit level are the Fourth and Fifth Circuits, which reject class certification where fraudulent concealment and reliance are at issue. The Fifth Circuit's rule is the most categorical: A "fraud class action cannot be certified when individual reliance will be an issue." *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Applying that rule, the Fifth Circuit has twice reversed certifications of classes asserting fraudulent concealment against statute of limitations defenses. See *McManus* v. *Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003); *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003). The Fourth Circuit also has held that the individual reliance element necessary to prove fraudulent concealment for purposes of tolling a limitations period cannot be proved on a classwide basis. See *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998).[5]

In conflict with these decisions, the First and Third Circuits – like the Eleventh Circuit in this case – have held that a class asserting fraudulent concealment may be certified despite individual reliance issues. In *Waste Management Holdings, Inc.* v. *Mowbray*, 208 F.3d 288 (1st Cir. 2000), the First Circuit upheld the certification of a class in the face of individualized limitations issues differentiating the class members' claims. In so doing, the court expressly "reject[ed]" the Fourth Circuit's contrary decision in *Broussard*. 208 F.3d at 296 n.4. And, as set forth above, in *Linerboard*, the Third Circuit recognized the conflict between

[5] Relatedly, the Sixth Circuit has held that estoppel claims – *e.g.*, claims that the defendant should be estopped from asserting a limitations defense because of fraudulent concealment – "are typically inappropriate for class treatment" because they "require[] proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on the statements to his detriment." *Sprague* v. *General Motors Corp*, 133 F.3d 388, 398 (6th Cir. 1998) (en banc) (reversing class certification).

Broussard and *Waste Management*. 305 F.3d at 162. Siding with the First Circuit, the Third Circuit affirmed class certification even while recognizing that "certain determinations involving the fraudulent concealment defense to the statute of limitations will require individualized proof, which might vary among the assorted [class members]." *Id.*

B. The Decision Below Is In Substantial Tension With Decisions Of This Court Interpreting The Rules Of Decision Act.

The courts below "solved" the problem of classwide proof presented by plaintiffs' equitable tolling claims by eliminating it. As elaborated below, they adopted a legal rule that simply absolved each individual class member from having to prove his or her actual reliance on Exxon's statements. That ruling is but one example of a more fundamental problem with the certification order in this case, which, at its core, allowed the dealers to pursue *as a class* a pricing "overcharge" claim that admittedly had *nothing to do with the prices charged to any individual dealer*. Put differently, rather than requiring individual dealers to show that each personally paid more than Exxon's "established dealer price" for gasoline – which obviously would have precluded classwide treatment of their claims – the dealers were allowed to transform their individual claims into a special "classwide breach" claim, under which individual prices and contracts were deemed irrelevant. Exxon, however, indisputably does *not* set dealer prices on any nationwide or classwide basis, but instead employs a complicated system of evaluating wholesale market prices, which takes into account regional and local market conditions on a near-daily basis. Nonetheless, because Exxon was forced to defend against plaintiffs' breach claim on a classwide basis, it was precluded even from attempting to show that individual dealers, or dealers in certain regions, did *not* "overpay" for gasoline during the class period.

To accomplish classwide litigation of plaintiffs' breach claim, the courts below disregarded or altered a number of the different states' laws that otherwise would have applied in breach of contract actions brought by individual class members. In short, the courts adopted an approach to class certification that is increasingly common among the nation's courts: driven by a perceived "need to preserve a class action at all costs," the courts "distort[ed] the underlying theory of substantive liability beyond recognition." Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. Chi. Legal F. 475, 509.

That approach violates the courts' fundamental duty under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), to apply substantive state law in a diversity action, as well as their duty under *Amchem*, to apply Rule 23 so as *not* to "'abridge, enlarge or modify any substantive right,'" 521 U.S. at 613. And because the decision below creates the mirage of predominance under Rule 23 by rewriting or ignoring state laws as needed to overcome factual and legal variations among class members' claims, it "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.* at 625.

1. The first respect in which the class certification order here violates *Erie* and *Amchem* is by adopting, for purposes of this class litigation, a special rule of *presumed reliance* for the class members' equitable tolling claims.

Plaintiffs based their fraudulent concealment argument on an Exxon official's statements at annual dealer meetings that Exxon was still providing the DFC offset. Although *no* named plaintiff or class member testified that he or she heard and relied on Exxon's statements, the jury was permitted to infer that *every* class member relied on the statements because "the minutes of each annual meeting were sent to each dealer representative with the intention that they then be mailed to each individual dealer." App. 90a. But no plaintiff or class member testified that he or she received the minutes or read

them. Most important, not one dealer testified that he or she relied on the minutes in deciding whether or not to bring suit. That record would be entirely insufficient in jurisdictions where proof of *actual* reliance is required for equitable tolling. See *id.* at 185a-186a (citing jurisdictions requiring actual reliance).[6] The courts below circumvented that problem for purposes of this class action by adopting a special rule allowing the jury to *presume* that all class members relied on statements reported in the minutes.

Although a handful of states have adopted a rule that reliance may be presumed in fraud class actions,[7] the vast majority require every plaintiff to prove – even in a class action – that he or she personally heard and relied upon the asserted misrepresentation.[8] Plaintiffs did not and could not offer such individualized proof here. The Eleventh Circuit simply excused them from that requirement. That holding

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[6] Where actual reliance is required, a plaintiff can seek relief from a fraudulent misrepresentation "only if he in fact relies upon the misrepresentation in acting or refraining from action." *Restatement (Second) of Torts* § 537 cmt. a (1981); *see Coffin* v. *Dodge*, 76 A.2d 541, 543 (Me. 1950) ("[a] false statement, that had no influence on the decision of the party complaining, furnishes no ground for relief"). Thus "actual receipt and consideration of any misstatement remains central to the case of any plaintiff seeking to prove that he or she was deceived by the misstatement." *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000); *accord Mirkin* v. *Wasserman*, 858 P.2d 568, 584 (Cal. 1993); *Reich* v. *Mitrani Plasterers Co.*, 701 N.Y.S.2d 368, 369 (App. Div. 2000); *Schaaf* v. *Highfield*, 896 P.2d 665, 672 (Wash. 1995) (en banc).

[7] *E.g.*, *Dix* v. *American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987); *Cope* v. *Metropolitan Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998).

[8] *E.g.*, *Mirkin* v. *Wasserman*, 858 P.2d at 574; *In re Synergen, Inc. Secs. Litig.*, 154 F.R.D. 265, 267 (D. Colo. 1994) (Colorado law); *Gaffin* v. *Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992); *Stevens* v. *Thomas*, 361 S.E.2d 800, 804 (Ga. 1987); *Hazelhurst* v. *Brita Prods. Co.*, 744 N.Y.S.2d 31, 33 (App. Div. 2002); *McManus* v. *Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003) (Texas law).

impermissibly overrides state law and, by eliminating a key element of proof, enlarges class members' substantive rights, while diminishing Exxon's.

2. The class certification order here also altered Exxon's substantive rights by depriving it of a jury trial on all class members' damages claims. The courts below agreed that the approximately 10,000 class members in this case state separate and distinct claims for damages, and that "individualized proof of [each member's damages] claims would be necessary," App. 78a. The district court purported to resolve the manageability problem presented by these individualized damages claims by adopting an approach taken by the Second Circuit in *Wal-Mart Stores, Inc.* v. *Visa U.S.A. Inc. (In re Visa Check/Mastermoney Antitrust Litigation)*, 280 F.3d 124 (2d Cir. 2001), and rejected by the Fifth Circuit in *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998): It severed the damages claims from the liability determination and left them for resolution in an "ad hoc claims process." App. 70a.[9] Under this procedure, damages will be determined not by a jury, but by a private, appointed claims administrator. This is a patent violation of Exxon's Seventh Amendment rights. See *Feltner* v. *Columbia Pictures Tel., Inc.*, 523 U.S. 340, 353 (1998); see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) ("the applicability of the Seventh Amendment is not altered simply because the case is a Rule 23(b)(3) class action").

3. The courts below also altered substantive law to avoid variations in state law regarding what constitutes the "good faith" required in the setting of prices under an "open price" contract term. U.C.C. § 2-305(2). According to the U.C.C.'s official comment, "in the *normal case* a 'posted price' . . .

[9] The certification order here thus deepens the conflict between *Visa* and *Allison* over the propriety of Rule 23(b)(3) class certification when thousands of individualized damages determinations will remain necessary despite class certification.

'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* § 2-305(2) cmt. 3 (emphasis added).

Decisions interpreting U.C.C. § 2-305(2) as adopted by the states have not reached a uniform conclusion as to the proper measure of a seller's good faith. Cf. *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (R.B. Ginsburg, J.) ("'The Uniform Commercial Code is not uniform.'") (quoting J. White & R. Summers, *Uniform Commercial Code* 7 (2d ed. 1980)). Some courts hold that a case is not a "normal case" whenever the seller acted in subjective bad faith.[10] The majority view, in contrast, is that the seller satisfies U.C.C. § 2-305(2)'s "good faith" pricing requirement so long as the price charged was not "commercially unreasonable" in an objective sense – *i.e.*, it did not reflect price discrimination or was not substantially different from competitors' pricing.[11] The courts in this case, however, followed neither rule, but instead swept state law to one side, and instructed the jury to apply the *dictionary definition* of the word "normal" in determining whether Exxon was entitled to a presumption of good faith under § 2-305(2). App. 88a n.16. No state's law

[10] *See, e.g., Mathis* v. *Exxon Corp.*, 302 F.3d 448, 455-57 (5th Cir. 2002) ("[a]ny lack of subjective, honesty-in-fact good faith is abnormal"). The Texas Supreme Court is evaluating whether *Mathis* properly predicted Texas law. *See Shell Oil Co.* v. *HRN, Inc.*, No. 03-0555, 2003 Tex. LEXIS 566 (Dec. 19, 2003) (granting petition for review).

[11] *See, e.g., Tom-Lin Enters. Inc.* v. *Sunoco, Inc. (R&M)*, 349 F.3d 277, 281-82 (6th Cir. 2003) (contrasting Ohio law with Texas law as determined in *Mathis*); *Havird Oil Co.* v. *Marathon Oil Co.*, 149 F.3d 283, 290-91 (4th Cir. 1998) (South Carolina law); *Exxon Corp.* v. *Superior Court*, 60 Cal. Rptr. 2d 195, 204-05 (Cal. Ct. App. 1997); *Schwartz* v. *Sun Co (R&M).*, 276 F.3d 900, 905 (6th Cir. 2002) (Michigan law); *Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 422 (8th Cir. 1986) (Arkansas law); *Wayman* v. *Amoco Oil Co.*, 923 F. Supp. 1322, 1347, 1349 (D. Kan. 1996) (Kansas law).

has defined the legal term of art "normal case" by reference to a lay dictionary.[12]

C. The Issue Is Recurring And Important.

"The class action represents, without question, one of the most ubiquitous topics in modern civil law. It is only a small exaggeration to say that virtually every major innovation in liability, if brought about by litigation, will either be created by or reflected in the class action." Epstein, *supra*, at 475. Although more than 3000 class actions are filed in federal district courts every year,[13] this Court has not addressed Rule 23(b)(3) since 1996. The Court's guidance is sorely needed. Although Rule 23 issues frequently recur, the lower courts have failed to develop clear principles governing application of the Rule. See *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d

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[12] The courts below also disregarded state laws governing construction of an agreement, signed by more than 5,000 members of the class, unambiguously releasing Exxon from all claims, known and unknown, existing at the time of the release. *See* App. 90a n.18. The courts allowed those dealers to remain members of the class, saying that "the releases would be voidable if the jury found that Exxon breached its duty of good faith and fraudulently concealed its breach." *Id.* That holding does not reflect the law of *any* state governing the dealers' claims. *See* 13 Sarah H. Jenkins, *Corbin on Contracts* § 67.9 (rev. ed. 2003) (a release is voidable if the defendant committed fraud *in inducing the plaintiff to sign the release*). Concealing an underlying breach-of-conduct claim is not the same as fraudulently inducing the release of unknown claims; the latter requires a distinct, affirmative act of fraud, duping the plaintiff into releasing his claims. *See Ingram Corp.* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983); *Pioneer Res., LLC* v. *D.R. Johnson Lumber Co.*, 68 P.3d 233, 243 (Or. Ct. App. 1993); *Mazzoni Farms, Inc.* v. *E.I. DuPont DeNemours & Co.*, 761 So.2d 306, 316 (2000); *Dresden* v. *Detroit Macomb Hosp. Corp.*, 553 N.W.2d 387 (Mich. Ct App. 1996). Again, the court altered substantive law to avoid individual inquiries and create artificial predominance under Rule 23(b)(3).

[13] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 14, 2004).

832, 835 (7th Cir. 1999) (because "a large proportion of class actions settle . . . , fundamental issues about class actions are poorly developed"). This case provides an ideal opportunity for the Court to clarify the proper application of Rule 23.

Such clarity is important because invocation of the class action device implicates serious due process and federalism concerns, as this case demonstrates. Due process demands that plaintiff and defendant alike be afforded a fair opportunity to litigate all of his or her claims and defenses. See *supra* at 19-20. But where the courts alter the substantive law that applies to class members' individual claims to facilitate a class action, "the ability of the defendant to mount an effective defense on liability in each individual case may be effectively compromised in order to allow the class action proceed as such." Epstein, *supra*, at 512-13; see *id.* at 513 ("In principle, it looks as though a systematic inability to present relevant evidence against a claim counts as a denial of the right to a full and fair trial, and thus brings into question whether the class action model as applied comports with the requirements of procedural due process"). That is precisely what happened here. The courts altered substantive law to eliminate material differences among the class members' individual claims, denying Exxon its right to present a full defense of each claim. And, as this case shows, the consequences of that denial can be magnified exponentially – the defendant unfairly loses not a single claim, but *all* claims when they are shoehorned into a single multi-state class.

This case also shows that misuse of Rule 23 in diversity cases infringes the rights of states, as well as the rights of litigants. The fundamental premise of our federalist structure is that the states are free to reach *differing* policy judgments about whether and how to regulate conduct that occurs within their own borders. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 123 S. Ct. 1513, 1523 (2003). Congress may choose to impose a nationwide legislative solution to a nationwide problem; but when Congress has not done so, the

policy decisions of individual states constitute the law. Properly administered, Rule 23 ensures that federal courts certify multi-state classes in diversity cases only when the applicable state laws are materially indistinguishable. Courts may not override and homogenize state law in a quest to certify a multi-state class:

> Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. [*In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020-21 (7th Cir. 2002) (citations omitted), *cert. denied*, 537 U.S. 1005 (2003).]

The courts in this case disregarded that basic principle. Other courts are doing the same. This Court should grant review and reassert the primacy of state and individual rights in the application of Rule 23.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 14, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Nos. 01-15575, 01-16244

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

ROY PAGE, GLEBE ROAD EXXON, INCORPORATED,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant, Cross-Appellee.

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. NORTHLAKE EXXON, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees,

ROY PAGE, *et al.*,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant.

March 15, 2004

ON PETITION FOR REHEARING EN BANC

Before EDMONDSON, *Chief Judge*, and TJOFLAT, BIRCH, BLACK, CARNES, BARKETT and WILSON, *Circuit Judges*.*

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

TJOFLAT, Circuit Judge, dissenting from the Denial of Rehearing En Banc, in which BIRCH, Circuit Judge, joins:

I dissent from this court's decision to let the panel's ruling stand because I disagree with the panel's interpretation of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367.[1]

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* Judges Anderson, Dubina, Hull and Marcus, having recused themselves, did not participate.

Judge William H. Pryor Jr. became a member of the court on February 20, 2004, and did not participate in the en banc poll.

[1] The federal supplemental jurisdiction statute provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

This law does not empower federal courts to exercise supplemental jurisdiction over the claims of unnamed class members in diversity-based class actions who fail to satisfy the amount-in-controversy requirement of the federal diversity statute, 28 U.S.C. § 1332.[2] The Supreme Court's holding

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[2] The federal diversity statute provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) Citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), requiring each unnamed class member in a diversity-based class action to meet § 1332's amount-in-controversy requirement in order to invoke a federal court's jurisdiction, remains good law.[3] The panel's opinion in this case will have wide-ranging ramifications on a variety of other areas of the law and lead to massive practical problems. *See infra* Subsections II.C.3, II.C.8.

Regardless of the underlying merits of this dispute, however, this issue is one where careful judicial consideration should not end with a three-judge panel, or even an en banc sitting of a circuit court of appeals, but with the Supreme Court of the United States. In light of its own criteria for granting certiorari, the Court should issue an authoritative determination as to the proper interpretation of § 1367.

I will readily admit that, upon initially considering this subject, one's eyes might glaze over with bored indifference, because it might seem like nothing more than an esoteric point of civil procedure of little interest or practical import to the majority of the nation. Indeed, most Americans have probably never heard of supplemental jurisdiction, and many students have probably graduated law school without having pondered the implications of § 1367's enigmatic language. Upon further reflection, however, it becomes readily apparent that this seemingly obtuse issue raises fundamental questions concerning constitutional law, statutory interpretation, and the integrity of the judicial system that merit the attention and admittedly limited resources of the Supreme Court. *See*

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28 U.S.C. § 1332(a). I refer to the portion of this statute requiring that the "matter in controversy exceed[ ] the sum or value of $75,000" as § 1332's "amount-in-controversy requirement."

[3] To enhance the readability of this opinion, when I refer to "unnamed plaintiffs," it should be understood as referring to "unnamed plaintiffs in diversity-based class actions who fail to satisfy the minimum amount-in-controversy requirement of § 1332."

generally Thomas E. Baker, *Why We Call the Supreme Court "Supreme": A Case Study on the Importance of Settling the National Law*, 4 *Green Bag 2d* 129 (2001) (arguing that the Supreme Court has a responsibility to resolve the supplemental jurisdiction question).

I. A Brief Introduction to the Supplemental Jurisdiction Controversy

In general, district courts may not entertain a particular type of claim unless Congress has expressly granted them jurisdiction to hear it. *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."). Over the years, however, the Supreme Court has created certain exceptions to this general rule. For example, 28 U.S.C. § 1331 permits district courts to hear cases brought under federal statutes ("federal question" cases). In 1966, the Court held that a district court hearing a federal question case may exercise "pendent jurisdiction" over state-law claims brought by the same plaintiff against the same defendant as long as they arise from the same "common nucleus of operative facts." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (establishing the modern test for pendent jurisdiction); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) (holding that where a plaintiff brings federal-law claims against a defendant, the plaintiff may not pursue state-law claims against a third-party defendant interpled by the original defendant, even if such claims arise from the same transaction or event that gave rise to the underlying federal claims against the original defendant).

Similarly, the Supreme Court has held that a district court may exercise "ancillary jurisdiction" over "claims by a defending party haled into court against his will [against the plaintiff or third parties], or by another person whose rights

might be irretrievably lost unless he could assert them in an ongoing action in a federal court." *Id.* at 376, 98 S.Ct. at 2404.

The Supreme Court has never expressly tied either of these doctrines—"pendent jurisdiction" and "ancillary jurisdiction" —to a particular statute; rather, these doctrines evolved solely as a matter of common law within the judiciary. When Congress enacted the Judicial Improvements Act of 1990, however, it attempted to combine and codify these doctrines under the rubric of "supplemental jurisdiction." *See* Judicial Improvements Act of 1990, § 310(a), Pub.L. 101-650, Dec. 1, 1990, 104 Stat. 5089, *codified at* 28 U.S.C. § 1367. One important question that has arisen is how this statute applies in diversity-based class action suits, and the degree to which it overrules certain Supreme Court precedents.

Before the enactment of § 1367, the Supreme Court had held that all plaintiffs in diversity-based class actions, including unnamed class members, had to meet the amount-in-controversy requirement set forth in the federal diversity statute, 28 U.S.C. § 1332, for diversity-based suits.[4] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973) ("Each plaintiff in a Rule 23(b)(3) class

[4] Interestingly, the Court excused unnamed plaintiffs from satisfying the other requirement of § 1332—diversity of citizenship. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366, 41 S.Ct. 338, 342, 65 L.Ed. 673 (1921) ("The intervention of the Indiana citizens in the [class action] suit [against defendants who were citizens of Indiana] would not have defeated the [district court's diversity] jurisdiction. . . ."). The Court never explained why it treated § 1332's diversity-of-citizenship and amount-in-controversy requirements differently, except to suggest that allowing unnamed plaintiffs to evade both requirements would open the floodgates to too much litigation in federal courts. *See Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969) ("To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.").

action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ."). While the *Zahn* Court never expressly mentioned supplemental jurisdiction (or its antecedents, pendent and ancillary jurisdiction), the ruling's language was broad enough to preclude district courts from exercising any sort of jurisdiction over such plaintiffs. *See id.* at 301, 94 S.Ct. at 511 ("[A]ny plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."). Put simply, a district court could not entertain claims by class members who did not allege at least the jurisdictional amount in damages (now $75,000), even if the named plaintiffs overcame this hurdle.

The Court based this conclusion on two considerations. First, it believed that the opposite holding would wreak havoc on the judiciary's workload. *See, e.g., Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969) ("The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship. . . . To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law."). Second, the Court recognized that Congress had relied upon this interpretation in continuously re-enacting § 1332's amount-in-controversy language. *Zahn*, 414 U.S. at 301, 94 S.Ct. at 512 ("[W]e have no good reason to disagree with . . . the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years."); *Snyder*, 394 U.S. at 339, 89 S.Ct. at 1058 (refusing to depart from "a judicial interpretation of congressional language that has stood for more than a century and a half," particularly where "Congress has consistently re-enacted its prior statutory language . . . in the face of a settled interpretation of that language").

The main issue in the case at hand, *Allapattah Serv. v. Exxon Corp.*, 333 F.3d 1248, 1255 (11th Cir.2003), is whether 28 U.S.C. § 1367 codifies or overrules *Zahn*'s approach to class actions. Put another way, does § 1367 allow district courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions who fail to satisfy § 1332's amount-in-controversy requirement?[5]

The panel answered in the affirmative. It began its analysis by ascertaining that the *named* plaintiffs in the lawsuit satisfied § 1332's diversity-of-citizenship and amount-in-controversy requirements for invoking diversity jurisdiction. The panel then applied what it claimed was a plain-meaning interpretation of § 1367 to conclude that the district court could exercise supplemental jurisdiction over the *unnamed* plaintiffs' claims because they were sufficiently related to the *named* plaintiffs' claims as to "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The panel observed that, since claims by unnamed plaintiffs in a class action are brought under Federal Rule of Civil Procedure 23, they do not fall within any of the exceptions to supplemental jurisdiction

[5] The question is limited to diversity-based class actions because the statute giving district courts jurisdiction over federal-question cases does not contain an amount-in-controversy requirement. Moreover, the question is limited to unnamed plaintiffs because, in order for a district court to exercise supplemental jurisdiction over certain parties' claims, it must be able to exercise substantive jurisdiction (e.g. diversity jurisdiction) over *someone's* claims. A court cannot exercise supplemental jurisdiction over the claims of everyone in the case; supplemental jurisdiction is parasitic—to even be potentially applicable, at least one person must meet the requirements for directly invoking the court's substantive (that is, non-supplemental) jurisdiction. Finally, the question is limited to § 1332's amount-in-controversy requirement because the Court already held in *Ben-Hur* that unnamed plaintiffs in diversity suits are excused from § 1332's diversity-of-citizenship requirement. *See* 255 U.S. at 366, 41 S.Ct. at 342; *see also supra* note 4.

specified in 28 U.S.C. § 1367(b). *Allapattah*, 333 F.3d at 1255. The panel expressly refused to consider § 1367's legislative history. *Id.* at 1255 n. 5 ("We, however, see no need to parse the legislative history to divine congressional intent with respect to § 1367, because we consistently have reiterated that the text of a statute controls and that we may not consider legislative history when the statutory language is unambiguous.") (internal quotations omitted). Consequently, under the panel's approach, as long as the claim of one plaintiff in a diversity-based class-action lawsuit satisfies both of § 1332's jurisdictional requirements, the court may exercise supplemental jurisdiction over all of the unnamed plaintiffs' claims, even if they meet *neither* of § 1332's requirements.

Although I believe the panel's ruling is erroneous, *see infra* Part III, and that this circuit should have reviewed the matter en banc, the more salient issue at this point is the fact that the circuit courts of appeals—indeed, the entire federal judiciary—is deeply divided over this issue. For the reasons set forth in this opinion, I urge the Supreme Court to seriously consider resolving this contentious, important question.[6]

[6] Part II of this opinion discusses the reasons why this case warrants a grant of certiorari from the Supreme Court. The circumstances under which the Supreme Court will grant a writ of certiorari (discussed in the main text) are quite similar to the circumstances that warrant this court considering a matter en banc:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

Fed. R.App. P. 35(a). Consequently, my discussion in Part II as to why the Supreme Court should grant certiorari in this case is sufficient to

explain my disagreement with this court for failing to consider the matter en banc.

It is also appropriate to note that this was far from an ordinary en banc poll. According to Eleventh Circuit internal operating procedure, a strict majority of active court of appeals judges is required to vote to have a case heard en banc, regardless of the number of judges who may have recused from the case:

> Rehearing en banc may only be granted by affirmative vote of a majority of circuit judges in regular active service, as hereinafter provided. The recusal of a judge or judges does not affect the number of votes required for rehearing en banc to be granted. If, for example, there are 12 judges in regular active service on this court, one or more of whom are recused in a case, rehearing en banc may only be granted by affirmative vote of seven or more active judges.

Eleventh Circuit Internal Operating Procedure 35(3).

Because we have eleven active judges, it takes 6 judges to vote to hear a case en banc. In *Allapattah,* however, 4 active judges recused, leaving only 7 judges (including the author of the panel opinion below) to vote to hear the case en banc. As a result, once two judges voted against rehearing the case en banc, it became impossible to obtain the requisite number of votes and the poll was terminated. Consequently, the denial of an en banc rehearing should not be interpreted as necessarily reflecting the opinions of a majority of this court's members. It is, at best, a byproduct of our circuit's procedure for handling recusals in en banc polls.

Most other circuits take a different approach to recusals in en banc polls. Instead of requiring that a majority of *all* active judges on the court vote to rehear a case en banc, regardless of how many might be disqualified from that case, a good number of circuits instead require only that a majority of *non-recused* active judges vote to hear the case. *See 1st Cir. Local R.* 35(a) ("Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified . . . ."); *2d Cir. Local R.* 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in regular active service' shall be calculated . . . for purposes of ordering a hearing or rehearing en banc."); *3d Cir. Local R.* 35.3 ("For purposes of determining the majority necessary to grant a petition for rehearing, all circuit judges currently in regular service who are not disqualified will be counted."); *7th Cir. Operating Procedures* 5(d)(1) ("A simple majority of the *voting* active judges is required to grant a rehearing en banc.")

(emphasis added); *9th Circuit Gen. Orders* 5.5d ("If a majority of the non-recused active judges votes in favor of en banc consideration, the Chief Justice shall enter an order taking the case en banc . . . ."); *9th Circuit Gen, Orders Amnds.* 5.1(3) ("'Judge eligible to vote' means any active judge who is not recused or disqualified . . . ."); *10th Circuit R.* 35.5 ("A majority of the active judges who are not disqualified may order rehearing en banc."). It appears that the Sixth Circuit also follows this rule, but its local rules are somewhat ambiguous in this respect. *See 6th Cir. Internal Operating Procedure* 35(a) ("Only Sixth Circuit judges in regular active service and who have not recused themselves from the particular case may cast votes in a poll on the en banc petition itself."). Other circuits follow the Eleventh Circuit rule and count recused judges in determining the number of votes necessary for a rehearing en banc. *See 4th Cir. Local R.* 35(b) ("For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified."); *5th Cir. R.* 35.6 ("Judges in regular active service who are disqualified for any reason . . . nevertheless shall be counted as judges in regular active service."); *8th Cir. Internal Operating Procedures* IV(D) ("A rehearing en banc is granted if a majority of judges in regular active service vote affirmatively."); *Fed. Cir. R.* 35(a) ("A case will be reviewed en banc if a majority of judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service."); *D.C.Cir. Handbook of Practice & Internal Procedures* 58 ("On this question [of en banc rehearings] only active judges of the Court may vote, and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing en banc in order for it to be granted.").

In 1992, the Advisory Committee on Appellate Rules proposed the creation of a uniform national rule to govern the way in which recusals are counted in en banc polls, but this suggestion was withdrawn due to opposition from the Chief Judges of four circuits. The Chief Judges argued that "the method used by a circuit to convene an in banc [sic] hearing is a uniquely internal function . . . [and] that the courts of appeals have historically had the power to define the base from which a majority is determined. . . ." *Issues and Changes: Proposed Amendments to the Federal Rules of Appellate Procedure,* 147 F.R.D. 323, 330 (1991); *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3981.1, at 616-17 (3d ed.1999) (discussing the right of each circuit to decide for itself the number of judges necessary for rehearing en banc).

II. The Supreme Court Should Grant Certiorari in This Case to Offer a Definitive, Uniform Interpretation of 28 U.S.C. § 1367

The Supreme Court should grant certiorari in this case to resolve the controversy over whether district courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions. As Chief Justice Rehnquist recognized, "[a] high degree of selectivity is . . . enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction." *Hubbard v. United States*, 514 U.S. 695, 720, 115 S.Ct. 1754, 1767, 131 L.Ed.2d 779 (1995) (Rehnquist, C.J., dissenting). Nevertheless, I believe this case presents exactly the type of circuit split on an issue of national importance that warrants the Court's attention.

Rule 10 of the Supreme Court provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power.
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. This rule further notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Though the language of this rule is far from precise, the § 1367 issue contains most of the features that Rule 10 deems necessary (if not sufficient) for a question to warrant Supreme Court review.[7]

A. *Supreme Court Review is Warranted in Light of the Deep and Abiding Split Among Federal Circuit Courts of Appeals*

"[T]he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below." Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 *Va. L.Rev.* 717, 726 (1993) (*quoting* H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)). No issue facing federal circuit courts of appeals

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[7] At first blush, it might appear unseemly for an individual circuit judge to advocate in a dissenting opinion that the Supreme Court grant certiorari in a particular case. In fact, this has been done by a number of judges in circuits across the country. *See, e.g., O'Neill v. United States*, 140 F.3d 564 (3d Cir.1998) (Becker, C.J., dissenting) ("I urge the Supreme Court to grant certiorari and reconsider *Feres* [*v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950)]"); *Brown v. Bryan Cty.*, 235 F.3d 944 (5th Cir.2000) (DeMoss, J., dissenting from denial of reh'g en banc) ("I state this as a matter for the public record in order to . . . encourage the Supreme Court to grant certiorari in this case and clearly decide the issue . . . ."); *see also Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 602 (9th Cir.2000) (Kleinfeld, J., concurring in part and dissenting in part) ("A decision like today's, where we set up an inter-circuit conflict on a matter of great national importance, is colloquially known among those of us who do appellate law for a living as 'cert bait.' That is to say, we have furnished the Supreme Court with a reason to grant a petition for certiorari."). Federal judges have an obligation to speak out with regard to the administration of our nation's justice system.

today has generated as deep and abiding a schism as the question of supplemental jurisdiction under § 1367. With the Eleventh Circuit's ruling in this case, five federal appellate courts are of the opinion that unnamed plaintiffs may invoke supplemental jurisdiction in diversity-based class actions without satisfying § 1332's amount-in-controversy requirement, while three courts adhere to the opposite conclusion.

Circuits (such as the Eleventh) maintaining that § 1367 extends supplemental jurisdiction to the claims of unnamed class members invariably rest their conclusions upon what they interpret to be the plain meaning of the statute. *See Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir.2003) ("[T]he language of § 1367 clearly and unambiguously overrules *Zahn* and allows a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount in controversy requirement."); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 117 (4th Cir.2001) ("Section 1367 is a broad grant of authority for supplemental jurisdiction, subject only to the express limitations in the Act; it does not contain unspoken limits on the statutory text. Thus, § 1367 plainly does not require that all class members must independently meet the amount in controversy requirement of § 1332.") (citation omitted); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir.2001) ("[T]he text of § 1367 is clear, and . . . it confers supplemental jurisdiction over the claims of class members in a diversity class action when named plaintiffs have claims with an amount in controversy in excess of $75,000."); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir.1996) ("[A]lthough . . . some legislative history suggests that the responsible committees did not expect § 1367 to upset *Zahn*, the text [of § 1367] is not limited in this way."); *Free v. Abbott Labs.*, 51 F.3d 524, 528 (5th Cir.1995) ("[Section 1367's] first section vests federal courts with the power to hear supplemental claims generally, subject to limited

exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions.").

As discussed in Part III, there are serious questions as to whether these decisions correctly interpret the statute's plain meaning. Indeed, several circuits conclude that the plain meaning of the statute requires them to reach the opposite conclusion.. *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir.1998) ("[I]n our view § 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of 'matter in controversy' and to individually meet the $75,000 requirement."); *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 (3d Cir.1999) ("Our reading of [§ 1367] . . . convinces us that Section 1367 was not intended to substantially expand diversity jurisdiction. Setting aside the holding in *Zahn* (3)27 would have such an effect."); *see also Trimble v. Asarco, Inc.*, 232 F.3d 946, 961-62 (8th Cir.2000) (quoting several pages from the Tenth Circuit's holding in *Leonhardt* to demonstrate that the "plain meaning" of § 1367 prevents courts from exercising supplemental jurisdiction over unnamed plaintiffs' claims).

Such dissension among federal judges should make one reluctant to conclude that the statute's meaning is as "plain" as both sides insist that it is. While the statute's meaning may appear obvious to an individual reader, a court cannot responsibly declare language to be "clear" when, as a matter of empirical reality, significant numbers of jurists have reasonable, good-faith disputes over its meaning. A judicial fiat declaring a statute to be unambiguous does not make it so. *Leonhardt*, 160 F.3d at 640 ("[W]e recognize that it is difficult to argue persuasively that the statute is truly unambiguous when two circuit courts of appeal have reached the opposite conclusion from us, when a majority of district courts are in agreement with us . . . and when commentators are divided.").

Because a majority of the federal circuit courts of appeals have addressed this question and failed to come to a consensus—indeed, they have reached diametrically opposing views on the issue—the Supreme Court should exercise its certiorari jurisdiction to resolve this circuit split. The circuit courts have been wrestling with this issue on their own for close to a decade. In the absence of Supreme Court intervention, it is highly unlikely that this rupture will mend itself.

B. *The Split Over § 1367 Extends Beyond Circuit Courts of Appeals and Permeates the Entire Legal System*

The question of supplemental jurisdiction in diversity-based class actions has mired not only the circuit courts of appeals in confusion and disarray, but district courts and legal commentators, as well. The dissension among circuits has played out across district court opinions, learned treatises, law review articles, and even bar review books.[8] Such a conflict among district courts "has been recognized as a factor tending

[8] One well-known bar review outline refers to the circuit split without being able to state a definitive rule of law:

> (1) Does the Supplemental Jurisdiction Statute overrule *Zahn*?
>
> Four of the United States Courts of Appeals—the Fourth, Fifth, Seventh, and Ninth Circuits—have held that the supplemental jurisdiction statute overrules *Zahn* and requires only that the claim of the class representative exceed $75,000. On the other hand, three other Courts of Appeals (the Third, Eighth, and Tenth Circuits) have rejected this argument and continue to require that each class member's claim meet the jurisdictional minimum. The split of authority on this issue remains.

Brian J. Sacks et al., *BarBri Bar Review—California, Civil Procedure* 35 (2003) (citations omitted). When doctrinal controversies reach the point where they are enshrined in bar review outlines, the situation practically calls out for resolution by the Supreme Court. It is unthinkable that aspiring lawyers can be told only that a wide-ranging controversy rages over the scope of federal courts' jurisdiction, and that the extent of a court's congressionally authorized power depends on the place in which one files suit.

to reinforce some other and more substantial basis for review. . . . Indeed, the importance of an issue for certiorari purposes can sometimes be identified by the degree of diverse and conflicting views that lower courts, as well as commentators, have expressed." Robert L. Stern et al., *Supreme Court Practice* 238 (8th ed.2002).

District courts have adopted a wide variety of approaches in interpreting § 1367.[9] Several district courts (agreeing with the Third, Eighth, and Tenth Circuits) found that the plain meaning of the statute squarely precludes unnamed plaintiffs in diversity-based class actions from invoking supplemental jurisdiction under § 1367 without meeting § 1332's amount-in-controversy requirement.[10] Many other courts have held

[9] Many of these cases address the exercise of supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions who fail to meet § 1332's amount-in-controversy requirement, where a named plaintiff meets that standard. A good number of these cases, however, address the closely-related question of whether courts may exercise supplemental jurisdiction over named co-plaintiffs who fail to meet § 1332's amount-in-controversy requirement in "regular" (non-class-action) civil suits where at least one of the other plaintiffs seeks at least the requisite amount in damages.

[10] *See, e.g., Duet v. Lawes*, No. 94-0739, 1994 WL 151095, at * 2, 1994 U.S. Dist. LEXIS 4755, at *7 (E.D.La. Apr. 7, 1994) (holding that the "original jurisdiction over a civil action" language in § 1367(a) renders supplemental jurisdiction unavailable to unnamed plaintiffs who do not meet § 1332's amount-in-controversy requirement); *Chee Chung Leung v. Checker Motors Corp.*, No. 93C2704, 1993 WL 515470, at *2, 1993 U.S. Dist. LEXIS 17174, at *5 (N.D.Ill.Dec. 7, 1993) ("[T]he implication [of § 1367(b)] is that plaintiffs without an independent ticket of entry to federal court should not be able to get into federal court by 'piggybacking' onto other claims which do satisfy the jurisdictional requirements."); *N. Am. Mech. Servs. Corp. v. Huberi*, 859 F.Supp. 1186, 1189 (C.D.Ill.1994) ("Section 1367(a) expressly provides that district courts do not have supplemental jurisdiction over state claims when another federal statute expressly provides otherwise. Section 1332 provides otherwise, and § 1367 does not overrule § 1332's aggregation rules."); *Borgeson v. Archer-Daniels Midland Co.*, 909 F.Supp. 709, 716

that the statute was sufficiently ambiguous to allow recourse to its legislative history, though they did not identify the specific provision of the statute that was held to be ambiguous or explain the source of their confusion.[11] Based on the statute's unusually clear legislative history, *see infra* Section III.C, such courts quickly agreed that unnamed plaintiffs in diversity-based suits may not use § 1367 as a way of evading § 1332.

A surprising number of courts that adopted this conclusion actually began their analyses by turning to the statute's legislative history without first ascertaining that its text is ambiguous.[12] One court even held that § 1367 should be

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(C.D.Cal.1995) ("[I]t is evident that the plain language of [§ 1367(a)] is entirely consistent with *Zahn*.").

[11] *See, e.g., Leroy Cattle Co. v. Fina Oil & Chem. Co.*, No. 93-1286-MLB, 1994 WL 151105, at *14, 1994 U.S. Dist. LEXIS 4802, at *47 (D.Kan. Mar. 2, 1994) ("[T]he meaning and purpose of § 1367, as it applies specifically to class actions, is neither 'unambiguous' nor 'clear' in the statutory language itself."); *Clement v. Occidental Chem. Corp.*, Nos. 94-1315 to 94-1317, 1994 WL 479155, at *6, 1994 U.S. Dist. LEXIS 12387, at *19 (E.D.La. Aug. 30, 1994) ("[T]he court finds that the meaning and purpose of 28 U.S.C. § 1367, as it applies specifically to class actions, is neither unambiguous nor clear in the statutory language itself."); *Daniels v. Philip Morris Cos.*, 18 F.Supp.2d 1110, 1114 (S.D.Cal.1998) ("[T]he Court finds that the statute is not clear and unambiguous on its face and, therefore, a review of the legislative history is appropriate."); *Kanter v. Warner-Lambert Co.*, 52 F.Supp.2d 1126, 1132 (N.D.Cal.1999) ("The language of section 1367 is ambiguous as to whether the statute was intended to overrule *Zahn*, but the legislative history is clear in that regard."); *Freeman v. Great Lakes Energy Partners, L.L.C.*, 144 F.Supp.2d 201, 210 (W.D.N.Y.2001) ("This court agrees with the district courts of this circuit, and with the Third Circuit, and finds that the language of sections 1367(a) and (b) is sufficiently ambiguous to make inquiry into its legislative history appropriate.").

[12] *See, e.g., Stoumen v. Pub. Serv. Mut. Ins. Co.*, No. 94-0233, 1994 WL 111355, at *2, 1994 U.S. Dist. LEXIS 4021, at *5 (E.D.Pa. Mar. 30, 1994) ("[T]he amendment's legislative history indicates that its drafters did not intend for the amendment to alter the jurisdictional requirements

interpreted according to its legislative history even if its plain meaning unambiguously extends supplemental jurisdiction to unnamed plaintiffs.[13]

A large number of other courts, also agreeing that unnamed plaintiffs did not qualify for supplemental jurisdiction, simply claimed that 1367's text and legislative history supported

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of diversity-based class actions as set forth in *Zahn*."); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255(LJF), 1993 WL 148978, at *4, 1993 U.S. Dist. LEXIS 5856, at *18 (S.D.N.Y. May 3, 1993) ("[C]ommentators have also concluded that the legislative history to § 1367 does not support a finding that the statute was intended to overrule *Zahn*. Thus, absent some showing that Congress had such an intent, this Court declines to exercise supplemental jurisdiction over class members' claims for less than [the jurisdictional amount].") (citation omitted); *Mayo v. Key Fin. Servs., Inc.*, 812 F.Supp. 277, 278 (D.Mass.1993) ("The legislative history of 28 U.S.C. § 1367 clearly indicates, however, that the statute was not intended to affect the jurisdictional requirements for diversity class actions set forth in *Zahn*."); *Averdick v. Republic Fin. Servs., Inc.*, 803 F.Supp. 37, 45 (E.D.Ky.1992) ("To this court, subsection (b) forbids use of the concept of supplemental jurisdiction created by subsection (a) to expand jurisdiction in diversity cases. The legislative history noted by the treatise recognizes this. . . . The legislative history of § 1367(b) provides that 'the section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions.'"); *Griffin v. Dana Point Condo. Ass'n*, 768 F.Supp. 1299, 1302 (N.D.Ill.1991) (citing § 1367's legislative history for the proposition that "a dramatic change in established law is not within the purview of [§ 1367]"); *Tortola Rests., L.P. v. Kimberly-Clark Corp.*, 987 F.Supp. 1186, 1190 (N.D.Cal.1997) ("In light of the legislative history, and the ensuing case law relevant to the issue, this Court agrees with those courts that have found that the Judicial Improvements Act did not overrule the Supreme Court decision in *Zahn*.") (footnote omitted).

[13] *See Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F.Supp. 808, 817 (E.D.Pa.1997) ("[I]f section 1367 is to be taken at face value, it would appear to contemplate supplemental jurisdiction over diversity class actions. . . . But there is reason to question whether section 1367's apparent inclusion of diversity class actions . . . should be taken at face value [because the legislative history] flatly contradict[s] that reading of the statute.").

their position, without offering any explanation or elaboration.[14] Still others simply accepted this conclusion without offering any analysis or reasoning at all.[15]

This is not to suggest that district courts have unanimously embraced this construction of § 1367. Many district courts have come down the other way, concluding that so long as a named plaintiff in a diversity-based class action suit satisfies § 1332's diversity-of-citizenship and amount-in-controversy requirements, every other unnamed plaintiff in the suit can automatically tag along by invoking the court's supplemental jurisdiction under § 1367.[16] The split among district courts—

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[14] *See, e.g., Riverside Transp. v. Bellsouth Telecomm.*, 847 F.Supp. 453, 456 (M.D.La.1994) ("[T]he Supreme Court's holding in *Zahn* has not been overruled by § 1367. This conclusion is supported by the language and legislative history of § 1367, the Fifth Circuit's decision in *Watson* [*v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir.1992)], and a majority of cases which have interpreted § 1367."); *accord Neve Bros. v. Potash Corp.*, 866 F.Supp. 406, 413 (D.Minn.1994); *see also Bradbury v. Robertson-Ceco Corp.*, 92 C 3408, 1992 WL 178648, at *2, 1992 U.S. Dist. LEXIS 10888, at *6-7 (N.D.Ill.1992) ("This court is also persuaded that Section 1367 did not alter the requirements of *Zahn*.").

[15] *See, e.g., Aspe Arquitectos, S.A. de C.V. v. Jamieson*, 869 F.Supp. 593, 595 (N.D.Ill.1994) ("[F]ederal jurisdiction must exist independently over each plaintiff's claim—that is the teaching of the seminal decision in *Zahn v. International Paper Co.*, and it has not been changed by Section 1367's later enactment of the concept of supplemental jurisdiction. . . ."); *Kaplan v. Mentor Corp.*, No. 94 C 6249, 1994 WL 592081, 1994 U.S. Dist. LEXIS 15779 (N.D.Ill.1994) (same); *Dirosa v. Grass*, No. 94-2551, 1994 WL 583276, at *2, 1994 U.S. Dist. LEXIS 15100, at *7 (E.D. La.1994) ("The recently enacted supplemental jurisdiction statute, 28 U.S.C. § 1367, does not change [*Zahn*'s] requirement.").

[16] *Forest v. Penn Treaty Am. Corp.*, 270 F.Supp.2d 1357, 1363 (M.D.Fla.2003) ("Upon a thorough review of the caselaw, the Court concludes that utilizing the plain meaning of the statute, the effect of *Zahn* has been abrogated by § 1367."); *Chapman Funeral Home, Inc. v. Nat'l Linen Serv.*, 178 F.Supp.2d 1247, 1255 (M.D.Ala.2002) ("Under the plain language of the statute, this court must conclude that *Zahn* is statutorily abrogated."); *Lindsay v. Kvortek*, 865 F.Supp. 264, 276 (W.D.Pa.1994) ("Although this area of the law is far from clear, the Court should apply § 1367 as written and exercise supplemental jurisdiction over Court [sic] II of the Amended Complaint."); *Garza v. Nat'l Am. Ins. Co.*, 807 F.Supp. 1256, 1258 (M.D.La.1992) ("Congress said what it meant and . . . meant what it said—the language of § 1367 unavoidably overrules these pre-§ 1367 cases in those instances where the requirements of § 1367(a) are fulfilled and the exceptions of § 1367(b) are inapplicable.").

regarding both the ultimate outcome of § 1367 cases as well as the widely divergent interpretive strategies being deployed—is deeply troubling. This morass of rulings not only leaves the area of supplemental jurisdiction unsettled, but raises important questions about proper techniques of statutory interpretation that can have ramifications for cases involving almost any federal law.

To fully appreciate the sheer magnitude of this interpretive schism, it is necessary to look beyond judicial opinions to the wider world of legal literature. The majority of major legal treatises argue that § 1367 overrules *Zahn*, although a few treatises have vacillated on this issue over the years. For instance, the latest edition of *Moore's Federal Practice* argues that § 1367 allows courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions:

> [B]y its express terms, Section 1367 would appear to overrule *Zahn*. Nevertheless, there is some legislative history to the statute that expressly states that this was not the Congressional intent. The circuits have split on the issue of whether *Zahn* remains good law. . . . The better view is that *Zahn* was overruled by the passage of the supplemental jurisdiction statute, despite the legislative history to the contrary. When the plain language and the legislative history of a statute conflict, the plain language should control unless its application would lead to absurd results.

5 *Moore's Federal Practice* § 23.07[3][c], at 23-47 to 23-48 (3d ed.2003); *see also* 16 *id.* § 106.44, at 106-61 to 106-66.4. A previous edition of *Moore's*, however, took the exact opposite approach, declaring, "[T]he 1990 supplemental jurisdiction statute does not overrule *Zahn* and will not affect class actions." 1 *Moore's Federal Practice* § 97[5], at 927,[17] *quoted in* Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 19 *Seton Hall Legis. J.* 157, 181 n.144 (1994).

Charles Alan Wright's treatise on federal courts likewise argues that supplemental jurisdiction extends to unnamed plaintiffs in class actions:

> The rule in class actions had been that only the citizenship of the named parties was considered, but that each member of the class, whether named or unnamed, must satisfy the jurisdictional-amount requirement. [Section 1367] was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions," as those requirements were interpreted prior to *Finley*. Unless the legislative history is to prevail over the plain language of the statute, however, the broad grant of supplemental jurisdiction in § [1367(a)] and the failure to include Rule 23 in the limitations on supplemental jurisdiction in § 1367(b) must mean that if one member of a class has a claim that satisfies the jurisdictional-amount requirement, other persons with smaller claims can be included in the class.

Charles Alan Wright, *Law of Federal Courts* 39 (1994) (internal citation omitted). The most recent edition of the Wright & Miller treatise fails to take a stand on the issue, *see* Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.), but the 1998 edition apparently found that § 1332's

[17] Because this source has been superceded, it has been impossible to obtain a copy to verify this citation.

amount-in-controversy requirement applied to unnamed plaintiffs, notwithstanding § 1367. *See* 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3523.1 (1998)[18] (arguing that *Zahn* is not abrogated by § 1367), *cited in Chapman*, 178 F.Supp.2d at 1250-51. The latest Hart & Weschler treatise, in contrast, does not defend either side. *See* Richard H. Fallon, et al., *Hart & Weschler's The Federal Courts and the Federal System* 926-30, 1490-93 (5th ed.2003).

Academic commentators have offered an even broader range of opinions on this question, with the weight of articles arguing that *Zahn* remains good law.[19] In short, the war over

[18] Because this source has been superceded, it has been impossible to obtain a copy to verify this citation.

[19] *Compare* James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 *U. Ill. L.Rev.* 1209, 1231 (arguing that an interpretation of § 1367 allowing unnamed plaintiffs to evade the amount-in-controversy requirement does not "fit with the rest of the law") (internal quotations omitted); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 *U. Pa. L.Rev.* 109, 148 (1999) (arguing that § 1367(a) does not permit courts to exercise supplemental jurisdiction over unnamed plaintiffs because "[t]he established rules of *Zahn* . . . form a part of the jurisdictional requirements in diversity proceedings, and they were incorporated into section 1367(a) by reference. Congress thus had no reason to create any explicit exception in 1367(b) for claims by plaintiffs joined under . . . Rule 23. . . ."); Laura L. Hirschfeld, *The $50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet 1332's Amount-in-Controversy Requirement?*, 68 *Temple L.Rev.* 107, 110 (1995) (arguing that "application of supplemental jurisdiction to diversity claims of less than [§ 1332's amount-in-controversy specification] is an erroneous interpretation of Congress's intent in enacting the statute"); Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 19 *Seton Hall Legis. J.* 157, 192 (1994) ("The best approach is to reaffirm the Supreme Court's position in *Zahn* and *Ben Hur*."); Thomas D. Rowe, Jr., et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 *Judicature* 213, 215 (1991) ("[T]he Supreme Court's holdings that only the named

§ 1367 has raged for over a decade with no end anywhere in sight. Only a Supreme Court ruling on this subject can bring uniformity to the law and definitively establish the scope of the jurisdiction of the federal courts. If the Supreme Court does not grant certiorari in this case, appellate courts, district courts, commentators, and attorneys will simply continue to talk past each other, deploying an unbelievably wide array of interpretive canons to reach radically divergent conclusions as to the scope of § 1367. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 46-47, 97 S.Ct. 2549, 2556, 53 L.Ed.2d 568 (1977) (noting that certiorari was granted on a legal question that "has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts").

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class representatives must satisfy the citizenship requirement of 1332 but that all class members must satisfy the amount in controversy requirement, remains good decisional law."); *with* Richard D. Freer, *Toward a Principled Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 *Ind. L.J.* 5, 18 (1998) (claiming that "[a]ll observers agree that the supplemental-jurisdiction statute, on its face, overrules *Zahn*"); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 *Ind. L.J.* 181, 185 (1998) (arguing that, in enacting § 1367, "Congress inadvertently overruled a long line of cases involving multiple plaintiffs in which the courts had consistently disallowed the use of supplemental jurisdiction to support the claims of those plaintiffs who failed to satisfy the amount in controversy requirement of the diversity statute"); Afshin Ashourzadeh, Comment, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction From the Jaws of Aggregation*, 26 *Sw. U.L.Rev.* 89, 120 (1996) ("Section 1367, by its plain meaning, permits plaintiffs in the 'composite' scenario to participate in the class action even if they do not satisfy the jurisdictional amount requirement."); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 *Emory L.J.* 963, 981 (1991) ("[T]he statutory language of section 1367 overrules *Zahn* and permits jurisdiction over diversity of citizenship class actions, even when the claims of some class members do not satisfy the jurisdictional amount in controversy.").

C. *The Supreme Court Should Grant Certiorari Because of the Overriding Importance of the Supplemental Jurisdiction Question*

Of course, the mere existence of even a gaping interpretive chasm has never been sufficient in itself to assure a grant of certiorari from the Supreme Court. As Supreme Court Rule 10 emphasizes, the Court will entertain only "important matter[s]" or "important question[s] of federal law." *Sup.Ct. R.* 10(a), (c); *see, e.g., Aldinger v. Howard*, 427 U.S. 1, 3, 96 S.Ct. 2413, 2415, 49 L.Ed.2d 276 (1976) (noting that certiorari was granted "to resolve the conflict on this important question"); *Jaffee v. Redmond*, 518 U.S. 1, 7-8, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (noting that certiorari was granted "[b]ecause of the conflict among the courts of appeals and the importance of the question").

Admittedly, there are a variety of ways in which the Court can interpret this standard. "Importance is a relative factor, dependent upon the type of issue involved, the way in which it was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case." Stern, *supra* at 244. Nevertheless, by almost any criteria the Court might use to determine the importance of a legal issue, the question of supplemental jurisdiction under § 1367 warrants its careful scrutiny. *See, e.g.*, Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.) ("This uncertainty in such an important area of federal jurisdiction [supplemental jurisdiction], in which rules should be clear, is extremely lamentable.").

1. *Section 1367 warrants the Court's attention because it raises jurisdictional issues*—The Supreme Court should grant certiorari in this case to offer a definitive interpretation of the scope of the jurisdictional grant contained within § 1367. Questions concerning the scope of jurisdiction of Article III courts are of critical importance. "It is a fundamental precept

that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

The Chief Justice has recognized how crucial it is to ensure that federal courts abide by congressionally imposed limits on their jurisdiction. "[A]n . . . important consequence of the disregard of congressional provisions as to our jurisdiction is a tendency to weaken the authority of this Court when it can demonstrate in a principled manner that it has either the constitutional or statutory authority to decide a particular issue." *Davis v. Jacobs*, 454 U.S. 911, 919, 102 S.Ct. 417, 422, 70 L.Ed.2d 226 (1981) (Rehnquist, J., dissenting); *see also Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 95-96, 98 S.Ct. 2620, 2642, 57 L.Ed.2d 595 (1978) (Rehnquist, J., concurring) (explaining that the preservation of "limitations on district court jurisdiction as carefully defined in our statutes and cases . . . . is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important.").

"Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 1570, 143 L.Ed.2d 760 (1999). The importance of subject-matter jurisdiction is further demonstrated by the fact that courts may—indeed, must—consider such questions *sua sponte* at every stage of the proceedings. *See United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 1785, 152 L.Ed.2d 860 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-

matter jurisdiction require correction regardless of whether the error was raised in district court.").

It is precisely because adherence to jurisdictional limitations is so important in maintaining the delicate balance of power among the various branches of the federal government that the Supreme Court frequently grants certiorari to resolve jurisdictional controversies. *See, e.g., United States v. Hohri*, 482 U.S. 64, 68, 107 S.Ct. 2246, 2249, 96 L.Ed.2d 51 (1987) (noting that the "importance of the jurisdictional question," as well as "the potentially broad impact of the Court of Appeals' decision," warranted certiorari); *see also* Stern, *supra* at 253 ("Among the many cases falling within this category [of being sufficiently important to warrant certiorari] are those involving the jurisdiction of federal district courts.") (citing *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952)). *But see K-Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 191, 108 S.Ct. 950, 960, 99 L.Ed.2d 151 (1988) (Scalia, J., dissenting) ("In a court that selects its docketed cases on the basis of the general importance of the issues they present, jurisdictional questions tend to get short shrift.").

It is inconceivable that such uncertainty about § 1367—an important font of subject-matter jurisdiction for the federal courts—should be permitted to persist for so long. If the majority of circuits are correct in holding that § 1367 permits the exercise of supplemental jurisdiction in diversity-based class actions, then a good number of other federal courts are wrongfully abiding by an unduly narrow conception of their powers. Such courts are failing in their constitutional duty to exercise the jurisdiction that has been granted them and decide cases that are properly before them. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 1720, 135 L.Ed.2d 1 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236,

1246, 47 L.Ed.2d 483 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). If, on the other hand, unnamed plaintiffs may not invoke supplemental jurisdiction under § 1367, then the majority of courts are acting well beyond the scope of their congressionally authorized powers, and entering binding judgments in cases they lack the fundamental power to decide in the first place. "Jurisdiction is power to declare the law. . . . [I]f there is no jurisdiction there is no authority to sit in judgment of anything else." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778, 120 S.Ct. 1858, 1865, 146 L.Ed.2d 836 (2000); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2179, 100 L.Ed.2d 811 (1988) (noting "[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists"). Whatever the ultimate merits of the § 1367 issue, the fact remains that a large number of courts—unelected judges who are not democratically accountable—are either abdicating or abusing their authority; maintenance of such a status quo is intolerable.

2. *The supplemental jurisdiction question raises important federalism issues*—The Supreme Court has always shown a special solicitude toward policing the boundaries of our federal system of government and protecting the limited independence and sovereignty of states guaranteed by the Tenth Amendment. Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 *Okla. L.Rev.* 727, 751 (2001) ("The data indicate[s] that the Supreme Court was more likely to grant a petition for certiorari if one or more of the legal issues involved an allegation of a federalism issue than if the petition did not involve such an issue."); *see, e.g., United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating a federal statute that exceeded the scope of Congress's powers and encroached upon states' police

powers); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 79, 120 S.Ct. 631, 643, 145 L.Ed.2d 522 (2000) (invalidating a federal statute enacted under an Article I, § 8 congressional power that allowed states to be sued as inconsistent with states' rights under the Eleventh Amendment); *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (invalidating a federal statute requiring state officials to participate in a federal law enforcement scheme).

This generalized dedication to preserving the traditional functions of states is even more apparent in cases where the Court is called upon to protect state courts from undue federal encroachment. In the realms of habeas corpus and abstention, the Court has consistently played a vital role in ensuring that federal courts do not upset the balance of power between the federal government and the states by adjudicating disputes that are constitutionally or statutorily entrusted to state tribunals. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 146, 119 S.Ct. 500, 503, 142 L.Ed.2d 521 (1998) ("A federal court upsets this careful [state-federal] balance when it sets aside a state-court conviction or sentence without first determining that the error had a substantial and injurious effect on the jury's verdict."); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.") (*quoting Cavanaugh v. Looney*, 248 U.S. 453, 457, 39 S.Ct. 142, 63 L.Ed. 354 (1919)). Such cases are premised upon the importance of maintaining a proper relationship between the state and federal judicial systems. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971) (explaining the centrality of comity between the federal and state judiciaries to "Our Federalism").

The question of supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions raises important questions of federalism and the respective roles of the federal and state judicial systems. Diversity-based suits necessarily involve questions of state law, which should presumptively be left to state tribunals. *See Speiser v. Randall*, 357 U.S. 513, 523 n. 7, 78 S.Ct. 1332, 1340 n. 7, 2 L.Ed.2d 1460 (1958) (noting the "basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts"). More importantly, if § 1367 does not permit federal courts to exercise supplemental jurisdiction over unnamed plaintiffs, then large portions of the federal judiciary are adjudicating disputes that are properly within the exclusive jurisdiction of state courts. Conversely, if § 1367 permits the exercise of supplemental jurisdiction, then a good number of circuits are improperly compelling many plaintiffs to confine their claims to state court, thereby denying them their right to a federal forum. Again, regardless of the proper interpretation of § 1367, the question has important implications for federalism—another factor warranting a grant of certiorari.

3. *Section 1367 raises important questions concerning statutory interpretation with potentially wide-ranging implications for other statutes*—This case raises several important questions of statutory interpretation that, in themselves, warrant careful consideration by the Supreme Court. *See, e.g., Shapiro v. United States*, 335 U.S. 1, 4, 68 S.Ct. 1375, 1377, 92 L.Ed. 1787 (1948) (noting that certiorari was granted "[b]ecause this conflict involves an important question of statutory construction"). As noted earlier, district courts have employed a wide range of canons of interpretation and arrived at mutually inconsistent conclusions as to § 1367's meaning. In determining which interpretation of § 1367 is the most accurate, this Court will also necessarily resolve interpretive issues of great import even beyond this case.

First, the Court might determine the point at which a deep split among courts allows a judge to conclude that, as an empirical matter, a statute is ambiguous. Second, the Court might consider the range of circumstances under which the *expressio unius* canon of interpretation is an appropriate tool for construing whether a list of exceptions (such as § 1367(b)) is exclusive.[20] *See, e.g., SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943) ("However well [statutory canons such as *expressio unius*] may serve at times to aid in deciphering legislative intent, they have long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose. . . ."). Moreover, it might clarify whether a statute's legislative history is a legitimate guide for determining when to apply *expressio unius*. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 760, 154 L.Ed.2d 653 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.").

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[20] Many courts and commentators point out that § 1367(a) confers supplemental jurisdiction to district courts, while § 1367(b) carves out claims brought under various Rules of Civil Procedure from this jurisdictional grant. Rule 23, governing class actions, is not among the rules specified in § 1367(b) over which district courts are prohibited from extending supplemental jurisdiction. It has been argued that, under the *expressio unius* canon, we must assume that the exclusion of class actions from § 1367(b)'s list of exceptions to supplemental jurisdiction was intentional. Consequently, it is claimed, there is no reason for excluding class actions under Rule 23 from § 1367(a)'s grant of supplemental jurisdiction. As a result, district courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions.

Of course, the legitimacy of this common argument rests entirely on the applicability of the *expressio unius* canon. As the Court has recognized, however, "[t]he maxim expressio unius est exclusio alterius is an aid to construction, not a rule of law," *Neuberger v. Commissioner*, 311 U.S. 83, 88, 61 S.Ct. 97, 101, 85 L.Ed.2d 58 (1940), and may not be applicable in every case. *See infra* Section III.A.

Third, the Court could explain the circumstances under which the "barking dog" canon of statutory construction may be applied. Under the Barking Dog Canon, general language in a statute should not be interpreted as applying to a specific, particularly controversial situation if there is no recognition whatsoever in the statute's text or legislative history that it would have had such an effect. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342-43, 119 S.Ct. 765, 779, 142 L.Ed.2d 797 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception."); *Chisom v. Roemer*, 501 U.S. 380, 396 & n. 23, 111 S.Ct. 2354, 2364 & n. 23, 115 L.Ed.2d 348 (1991) ("[I]f Congress had such an intent, [it] would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment. . . . Congress's silence in this regard can be likened to the dog that did not bark."); *Church of Scientology v. IRS*, 484 U.S. 9, 108 S.Ct. 271, 276, 98 L.Ed.2d 228 (1987) (Rehnquist, C.J.) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

It has been argued that this is an appropriate case for applying the barking dog canon. Virtually eliminating § 1332's amount-in-controversy requirement in diversity-based class actions, effectively overruling Supreme Court cases (including *Snyder* and *Zahn*), and throwing the doors of the federal courthouse open to a wide range of claimants who, throughout most of this country's history, would have been limited to state court are all major, important, and controversial changes that we would normally have expected Congress to specifically address somewhere either in the text of the statute or the legislative history.

Indeed, the Court itself used a variation of the barking dog argument in coming to its decision in *Zahn*:

> It also seems to us that the application of the jurisdictional amount requirement to class actions was so plainly etched in the federal courts prior to 1966 that had there been any thought of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries.

Zahn, 414 U.S. at 302, 94 S.Ct. at 512.

Fourth, the Court will be able to explain more fully the proper role of legislative history in statutory interpretation. More specifically, it will be able to answer whether there is ever a point at which, as many district judges seem to have assumed, crystal-clear legislative history can be relied upon to narrow the scope of otherwise broad, general language in a statute. Similarly, the Court would be able to determine definitively whether there can ever be a basis for enforcing legislative history over statutory language when the two are diametrically opposed.

Finally, the Court would be able to give guidance in applying the "substantive" canons of statutory construction to cases such as this. Examples include the directive to construe jurisdictional grants narrowly, *see Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 408, 79 S.Ct. 468, 499, 3 L.Ed.2d 368 (1959) ("[I]t is, finally, true that this Court has adhered to a policy of construing jurisdictional statutes narrowly."), and the doctrine of avoiding interpretations that

aggrandize the jurisdiction of federal courts at the expense of the states, *see Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreward: Law as Equilibrium*, 108 *Harv. L.Rev.* 26, 102-04 (1994) (listing substantive canons of construction based on respect for federalism-related principles). In light of the unique spectrum of interpretive questions with potentially wide-ranging implications raised by the § 1367 issue, the Court should not hesitate to grant certiorari.

4. *Large numbers of people are affected by diversity-based class actions*—Another way of gauging the importance of an issue is by assessing the number of people it affects. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 *Tex. L.Rev.* 1251, 1254 (1989) ("Importance, in this context, generally refers to the abstract significance of the underlying issue without regard to the existence of the conflict. How many people does the statute affect? How great an impact does the statute (or challenged interpretation) have?") (internal quotations omitted); Timothy S. Bishop & Jeffrey W. Sarles, *Earning Your Quill: How to Petition the United States Supreme Court for Certiorari*, 11 *Chicago Bar Ass'n Rec.* 16, 20 (1997) ("The best way to meet this burden [earning certiorari] is to show that the decision below has a significant impact not just on the petitioner but on a whole industry or large segment of the population."). The question of whether courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions has already affected hundreds of thousands, if not millions of people, corporations, and other businesses, and promises to continue to do so well into the future.

It is very difficult to find reliable statistical data on diversity-based class actions in general, much less such suits that specifically involve supplemental jurisdiction. Consequently, to determine the importance of this issue in terms of certain empirical factors (money at stake, number of people affected, potential expansion of the federal courts' caseload), it is necessary to extrapolate from what data we have available about class actions in general, and rely on anecdotal evidence derived from opinions in individual diversity-based class action suits where supplemental jurisdiction was actually invoked.

The Federal Judicial Center commissioned a study by Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic that examined all class action suits in four major judicial districts that terminated between July 1, 1992 and June 30, 1994.[21] Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 4 (1996), *available at* http:// www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf (last referenced Feb. 18, 2004). While the study did not uncover any hard and fast data on the ultimate size of certified classes, "[t]he median number of recipients of notice of certification or settlement (or both) was substantial,

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[21] The districts covered in the study are the Eastern District of Pennsylvania (including Philadelphia), the Northern District of Illinois (including Chicago), the Southern District of Florida (including Miami), and the Northern District of California (including San Francisco). Willging, *supra* at 4. The study's authors emphasize,

> Because this study did not employ random sampling or control or comparison groups, our results cannot and should not be viewed as representative of all federal district courts nor should causal inferences be drawn from the data. On the other hand, we have no reason or data that would lead us to believe that these districts are unusual or that they present a picture that is radically different from what one would expect to find in other large metropolitan districts.

Id. at 5.

ranging from approximately 3,000 individuals in one district to over 15,000 in another." *Id.* at 9. Some classes, of course, were much larger than these medians. "The average size of the class [in cases where individual class member recovery was under $100 per member] was 45,055 and the median size was 45,920 members." *Id.* at 14.[22]

Turning to specific cases that actually involve the question of whether courts may exercise supplemental jurisdiction over unnamed plaintiffs who fail to meet § 1332's amount-in-controversy requirement, we see that hundreds of thousands of people have already been affected by various courts' resolutions of this issue. The few cases that expressly reveal the number of people in the class suggest that we are dealing with large numbers of people. *See, e.g., Allapattah*, 333 F.3d at 1251 ("This case arises out of a class suit filed by approximately 10,000 Exxon dealers. . . ."); *Trimble*, 232 F.3d at 950 (noting that the case involved "a putative class of over 30,000 current and future residents of a geographic area near a former lead smelter and refinery"); *Forest*, 270 F.Supp.2d at 1359 & n. 2 (noting that the class involved "approximately 30,000 policy holders" whose health insurance premiums allegedly had been wrongfully increased by their insurance company). While many cases do not cite the specific number of class members, their descriptions of the classes or putative classes suggest that thousands—perhaps tens of thousands—of people are involved. *See, e.g., Daniels*, 18 F.Supp.2d at 1111 n. 1 (noting that the class was comprised of Californians who "in the last four years, would likely have been deceived by Defendants' deceptive warning labels and advertising campaigns as to the addictive nature of cigarettes, and that have become addicted to cigarettes due to

[22] To the degree that these are diversity rather than federal question suits, it is fair to assume that most of them involved supplemental jurisdiction since the amount recovered—less than $100 per class member—is far less than § 1332's amount-in-controversy requirement.

the addictive nature of nicotine"); *Borgeson*, 909 F.Supp. at 712 (noting that the class involved purchasers of corn syrup); *Kanter*, 52 F.Supp.2d at 1128 (noting that the class involved all Californians who purchased a particular, allegedly defective head-lice treatment).

While many other class actions involving supplemental jurisdiction affect much smaller groups, the sheer number of such suits is further evidence that significant numbers of people nationwide will be affected by resolution of the supplemental jurisdiction issue. *See, e.g., Clement*, 1994 WL 479155, at *1, 1994 U.S. Dist. LEXIS 12387, at *1 (noting that class was comprised of people injured by the emission of toxic substances in the wake of an explosion at a chemical plant); *Freeman*, 144 F.Supp.2d at 203-04 (noting that the class was comprised of owners of royalty interests in natural gas wells who were victimized by an alleged gas-reseller conspiracy to underpay them); *Benfield*, 1993 WL 148978, at *1 n. 1, 1993 U.S. Dist. LEXIS 5856, at *1 n. 1 (noting that class involved all people who purchased certain "dealer options" from a particular seller); *Chapman*, 178 F.Supp.2d at 1248 (noting that the class included member businesses from across the country—including a funeral home and Outback Steakhouses—that utilized a particular linen service); *Bradbury*, 1992 WL 178648, at *1, 1992 U.S. Dist. LEXIS 10888, at *1 (noting that the class included all employees of Robertson-Ceco Corp. and United Dominion Industries who had been denied overtime pay for the year 1991); *Russ*, 961 F.Supp. at 809 (noting that the class included all people allegedly tricked into waiving certain rights by an insurance company).

In short, this is not an obscure issue affecting small groups of people, but one that has tremendous ramifications for millions of class-member plaintiffs (and potential class-member plaintiffs) nationwide, as well as the large corporations and businesses who regularly get sued by them.

5. *Large amounts of money are at stake in diversity-based class actions*—"The fact that especially large amounts of money are involved in litigation over [an] issue of statutory construction may also be a persuasive factor" to the Supreme Court in deciding to grant certiorari. Stern, *supra* at 248.[23] The sheer number of diversity-based class actions, as well as the number of people involved in each, means that each year tens of millions of dollars hinge on resolution of the supplemental jurisdiction question. If unnamed plaintiffs in such suits are exempt from § 1332's amount-in-controversy requirement, defendants may find themselves liable for millions of dollars for which, under an alternate construction of § 1367, they could not be sued in federal court by those unnamed plaintiffs.

Again, we do not have the data necessary to determine exactly how much money has been awarded in recent years in federal diversity-based class actions implicating § 1367. Nevertheless, the data for class actions in general demonstrates that significant amounts of money have changed hands. The Willging study revealed that the median recovery to individual class members in federal class actions between 1992-94 ranged from $315 to $528, while the maximum awards ranged from $1,505 to $5,331 per class member. Willging, *supra* at 7. Even in cases where individual class members did not receive a large amount of money, the total dollar amounts at stake was often substantial. In cases where recovery was less than $100 per class member, "the average award to the class was $2.63 million and the median award was $2.55 million." *Id.* at 14.

[23] Stern goes on to point out that the amount of money potentially at issue is not "always sufficient by itself unless the amount is enormous." Stern, *supra* at 248. Needless to say, the amount of money potentially in question in diversity-based class actions is only one of numerous factors that makes the supplemental jurisdiction question eminently worthy of certiorari.

Theodore Eisenberg and Geoffrey P. Miller conducted a more recent study on attorney fees in class action cases. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study* (2003), *available at* http://www.stern.nyu.edu/clb/WP2003/03-017.pdf (last referenced Feb. 18, 2004). They reviewed "data on all state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be determined with reasonable confidence." *Id.* at 2.[24] According to this report, "the mean gross recovery [in class action suits] was $100 million in inflation-adjusted 2002 dollars, and the median gross recovery was $11.6 million. . . . A few large awards led to unusual peaks in the mean for the reported opinion data at over $200 million in 1994 and 2000. . . . [A] relatively high period from 1999 to 2002 ends with the median award at $15 million." *Id.* at 16-17. While these numbers are likely to be higher than the amounts recovered only in federal suits, they nevertheless give us good reason to believe that significant amounts of money are at stake in diversity-based class federal class actions.

6. *Diversity-based class actions comprise a substantial portion of the judiciary's caseload*—Another crucial reason why the Court should address the supplemental jurisdiction issue is because of the effect that it could have on the already overburdened caseload of the federal courts. As the Chief Justice recognized in his 2003 annual address, the federal judiciary's workload is at a "record high[ ]." Chief Justice William Rehnquist, *2003 Year-End Report on the Federal*

[24] Again, this data is somewhat problematic for our purposes because it not only contains *all* federal class actions (rather than only diversity-based class action suits involving supplemental jurisdiction), but state class action suits, as well. Nevertheless, the statistical aggregates it offers should at least give us a general idea as to the amount of money at stake in the subset of class actions on which this opinion focuses.

Judiciary (Jan. 1, 2004), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html (last referenced Feb. 18, 2004); *see also Williams v. United States*, 535 U.S. 911, 920, 122 S.Ct. 1221, 1227, 152 L.Ed.2d 153 (2002) (Breyer, J., dissenting) (noting "rapidly rising caseloads" in the federal courts).

The supplemental jurisdiction question warrants certiorari review because of the impact it will have on this already overextended docket. As of Sept. 30, 2003, there were 630 diversity-based class actions pending in federal court. Administrative Office of the Courts, *Judicial Business of the U.S. Courts: Annual Report of the Director for the Year Ended September 30, 2003* Table X-5 *U.S. District Courts Class Action Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit During the 12-Month Period Ending September 30, 2003* (unpublished manuscript; page number unavailable). It is fair to assume that a substantial number of these claims involve supplemental jurisdiction (it seems unlikely that each class member in each of these cases is seeking over $75,000 in damages). Given that, as of Jan. 4, 2004, there were only 653 sitting federal district court judges, *see* Rehnquist, *Year-End Report, supra*, the § 1367 issue affects the equivalent of one case on the docket of almost every district judge in the nation.

It is also important to recognize that class actions suits tend to be among the more lengthy and complicated cases. According to the Willging report, it took district judges a median time of between 2.8 months in the quickest district and 8.5 months in the slowest to rule on certification. Willging, *supra* at 8. Summary judgment in such cases sometimes does not occur until after at least a year of litigation. *Id.* Even circuit court dockets are not immune from the effects of such cases; appeals are filed in between 15-34% of them. *Id.* at 11. If it turns out that district courts lack jurisdiction under § 1367 over most of the claims at issue in

these suits, the result could be a partial alleviation of the judiciary's near-crushing caseload. This prospect is itself sufficiently important to warrant the Court's attention.

7. *The supplemental jurisdiction question implicates the separation of powers between Congress and the judiciary*— The supplemental jurisdiction issue also raises crucial separation of powers concerns. The importance of maintaining a proper balance among the powers of the three branches of the federal government is not only a structural end in itself, but is essential to the preservation of freedom in this country. "Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 2109, 141 L.Ed.2d 393 (1998) (Kennedy, J., concurring).

Courts must always be extremely careful in resolving jurisdictional questions because such cases allow them to expand or aggrandize the scope of their own powers, often at the expense of other branches of government. *See Taylor v. Beckham*, 178 U.S. 548, 580, 20 S.Ct. 890, 902, 44 L.Ed. 1187 (1900) ("This tribunal, therefore, should be last to overstep the boundaries which limit its own jurisdiction."). The gravity of such rulings is further enhanced by the fact that, as the Supreme Court has recognized since time immemorial, the Constitution accords Congress the exclusive power to determine the scope of district and circuit court jurisdiction.

> [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies [in Article III]. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

Sheldon v. Sill, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850).

Jurisdictional questions are of particular importance because they directly implicate the efficacy of Congress's attempts to regulate the lower courts. Jurisdictional statutes are among the most important checks and balances the Framers integrated into the tripartite structure of the federal government. Broad interpretations of jurisdictional grants undermine the regulatory role Congress plays over the jurisdiction of most Article III courts, thereby effectively reducing the scope of Congress's power to "check" the judiciary while expanding the scope of the courts' power.

8. *This ruling will have wide-ranging implications in other areas of the law that could lead to tremendous practical problems*—My discussion up until this point has been limited to the immediate effects of § 1367 on diversity-based class actions. It is clear, however, that the impact of nearly any holding on this issue will reverberate far beyond class action cases to affect a wide range of other matters, as well.

Historically, in non-class-action suits, the Supreme Court has enforced a "complete diversity" rule, requiring each named plaintiff to satisfy both the diversity-of-citizenship and amount-in-controversy requirements of § 1332. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L.Ed. 435 (1806) (concluding that, under the federal diversity, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts"). If courts may exercise supplemental jurisdiction over unnamed plaintiffs in class action suits who fail to satisfy § 1332's requirements, there does not seem to be any reason why courts would not also be able to exercise supplemental jurisdiction over named plaintiffs in "normal" (non-class-action) suits who fail to meet these requirements, as well. Put another way, there is no principled basis for limiting the panel's holding to only class action suits. *See*

Ren-Dan Farms v. Monsanto Co., 952 F.Supp. 370, 376 (W.D.La.1997) ("Defendants' proposed rule could lead to a finding of federal jurisdiction for an entire multi-party action where diversity only existed between two parties.").

Under the panel's interpretation of § 1367, only one plaintiff per diversity-based lawsuit—whether or not it is a class action—would have to meet § 1332's amount-in-controversy and diversity-of-citizenship requirements for a federal court to exercise supplemental jurisdiction over everyone else's claims. All the other plaintiffs in that suit, whether named or unnamed, could not only reside in the same state as the defendant, but have minuscule claims that come nowhere near 1332's amount-in-controversy requirement. "[P]laintiffs without an independent ticket of entry to federal court should not be able to get into federal court by 'piggybacking' onto other claims which do satisfy the jurisdictional requirements." *Leung*, 1993 WL 515470, at *2, 1993 U.S. Dist. LEXIS 17174, at *5. Thus, the supplemental jurisdiction question necessarily affects all diversity-based multiparty litigation.

Another area of the law that could potentially be dramatically affected by this holding is removal jurisprudence. A case filed in state court may be removed to federal court only if the federal court would have had jurisdiction over it had the plaintiff originally filed it there. *See Triggs v. John Crump Toyota*, 154 F.3d 1284, 1287 (11th Cir.1998) ("A civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court."). Under the panel's interpretation of § 1367, a significant number of cases that would not have been removable to federal court, due to the involvement of parties who did not satisfy § 1332's requirements, may now be removed. Indeed, the importance of our fraudulent joinder jurisprudence would also be greatly reduced, *see id.* (describing various doctrines for fraudulent joinder), since district

courts would likely be able to exercise supplemental jurisdiction over a significant number of parties whose involvement in a case would otherwise have defeated federal jurisdiction.

For these reasons, it is a mistake to believe that the impact of this § 1367 controversy is limited to diversity-based class actions; it will necessarily lead to potentially tremendous effects in all multiparty diversity cases as well as our removal jurisprudence.[25]

In short, the question of supplemental jurisdiction in diversity-based class actions is of sufficient importance to warrant a grant of certiorari due to: the jurisdictional nature of the issue, its potential impact on the relationship between state and federal courts, the questions concerning statutory interpretation it raises, the number of people affected, the large amounts of money typically involved in such cases, the potential reduction in the caseload of the federal courts that could result, the implications for separation of powers involved, and its likely effects far beyond the realm of class actions.

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[25] Even if (as I believe) *Zahn* remains good law under § 1367, and courts may not exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions, we are still left with troubling questions in non-class-action multiparty suits. It is possible, for example, that a plaintiff might be able to attempt to evade a limitation on supplemental jurisdiction in class actions by simply including all the members of the putative class in the complaint as named plaintiffs. If, outside the class-action context, § 1367 abrogates the *Strawbridge* complete diversity rule (discussed above), then only one plaintiff would have to meet § 1332's diversity-of-citizenship and amount-in-controversy requirements for the district court to exercise supplemental jurisdiction over everyone else. It is unclear whether parties should be able to circumvent constraints on supplemental jurisdiction through such procedural machinations (perhaps another reason to be somewhat skeptical of a plain-text, literal approach to § 1367).

D. *The Supreme Court Should Grant Certiorari Because of the Particular Need for Uniformity on the Supplemental Jurisdiction Question*

Another factor of particular significance to the Court in deciding whether to grant certiorari—closely related to the "importance" of an issue—is whether there is a particular need for nationwide uniformity. *See* Bishop & Sarles, *supra* at 20 (noting that certiorari is more likely to be granted if "the issue is one where uniformity counts—that the conflict is going to be difficult to live with"); Sturley, *supra* at 1255 ("Because the Court generally resolved conflicts to maintain uniformity in federal law, resolving conflicts is less important in fields where uniformity is relatively unimportant—regardless of how important (in the abstract sense) the underlying issues may be."). This Section demonstrates that there exist convincing reasons for the Court to establish a definitive, uniform interpretation of § 1367.

1. *The need to eliminate forum-shopping*—Perhaps one of the most basic reasons why it is particularly important to establish a uniform interpretation of § 1367 is to prevent forum-shopping by opportunistic plaintiffs. "[A]n intolerable conflict occurs when litigants are able to exploit conflicts affirmatively through forum shopping. . . ." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 *N.Y.U. L.Rev.* 681, 725 (1984); *see also* Sturley, *supra* at 1256 ("[F]orum-shopping risks and planning concerns may accelerate the need for the Supreme Court to decide an issue"). Since *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (interpreting the Rules of Decision Act as mandating that state judicial opinions be recognized as binding law by federal courts hearing diversity cases), the Supreme Court has been careful to interpret diversity-related laws with two goals in mind: "discouragement of forum-shopping and avoidance of inequitable administration of the

laws." *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965).

Forum-shopping is of particular concern in nationwide class action suits, where plaintiffs' attorneys can essentially cherry-pick whom they wish to make a named plaintiff and decide for themselves the district and circuit in which to file suit. In most cases, it will typically be a relatively trivial matter to sue in a circuit that permits the exercise of supplemental jurisdiction over unnamed plaintiffs who fail to satisfy § 1332's amount-in-controversy requirement. This is precisely the type of outcome-determinative forum-shopping the Court has long combated.

As the law stands today, the question of whether or not a district court will exercise jurisdiction over unnamed plaintiffs in a diversity-based class action depends less on the proper interpretation of § 1367 than it does on the place where an attorney decides to sue. The scope of a district court's power should not depend on the circuit in which it is located. Only a definitive ruling of the Supreme Court establishing a uniform, nationwide determination of the district courts' jurisdiction can prevent attorneys from gaming the system like this.

2. *The need to enforce important rights established by a federal statute consistently*—Another reason why uniformity is of particular importance in this case is because it involves interpretation of an important right guaranteed by a federal statute—the right to be heard in a federal court. "[S]urely it is hard to dispute that, in a country with a national government such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute." William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 *Fla. St. U.L.Rev.* 1, 11-12 (1986). As a

result of concerns over disparate interpretations of the scope of federal rights, "[o]ne of the Court's duties is to do its best to see that federal law is not being applied differently in the various circuits around the country." *Taylor v. United States*, 504 U.S. 991, 991, 112 S.Ct. 2982, 2982, 119 L.Ed.2d 599 (1992) (White, J., dissenting); *see also Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1017, 99 S.Ct. 626, 628, 58 L.Ed.2d 687 (1978) (White, J., dissenting from denial of certiorari) ("Is the federal law, statutory or constitutional, being interpreted and enforced differently in different sections of the country? This has been an important criterion for the exercise of the Court's powers since most of the Court's jurisdiction was made discretionary in 1925.").

The right to be heard in court is an important civil right. Differing interpretations of § 1367 means that the right of citizens (acting as unnamed plaintiffs) to have a federal court adjudicate their claims depends on the judicial district in which suit is filed. Given both the general importance of establishing consistent interpretations of rights guaranteed by federal statutes, as well as the specific importance of the right of access to federal courts in particular, the Court should step in to eliminate the morass of conflicting interpretations of § 1367.

E. *The Supreme Court Should Grant Certiorari to Protect the Integrity of its Decision Making*

An additional reason the Court should step in is because this case implicates the integrity of the Court's ruling in *Zahn v. International Paper*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed. 2d 511 (1973). As discussed in Part I, the *Zahn* Court, building on *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), determined that while unnamed plaintiffs are excused from § 1332's diversity-of-citizenship requirement, they are nonetheless required to satisfy its amount-in-controversy requirement. Several circuits have held that, by enacting § 1367, Congress legislatively overruled this deci-

sion. It bears repeating that § 1367 does not specifically address diversity-based class actions, and the legislative history is not only silent as to any intent to overrule *Zahn*, but unambiguously and explicitly declares that Congress intended to *preserve* that decision, *see infra* Section III.C.

In a hierarchical court system such as ours, we should always be somewhat skeptical when a lower court decides that it need no longer follow a decision of the United States Supreme Court because that decision has been overruled by general, broad statutory language. *Cf. Hubbard v. United States*, 514 U.S. 695, 713 n. 13, 115 S.Ct. 1754, 1764 n. 13, 131 L.Ed.2d 779 (1995) ("We would have thought it self evident that the lower courts must adhere to our precedents."); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) ("[O]nly this Court may overrule one of its precedents."); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). This is not a case where specific statutory language that had previously been interpreted by the Court is amended; instead, we are dealing with the degree to which a new federal statute should be read as implicitly nullifying the Court's rulings in the field of supplemental jurisdiction—an area that, for almost two centuries, has been within the exclusive province of the Court's discretion with no legislative guidance.[26] This is a judgment best made by the Supreme Court.

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[26] The Court's first supplemental jurisdiction ruling was arguably *Osborn v. President, Directors, & Co. of the Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824).

F. *The Court's Prior History With § 1367*

A final factor demonstrating that the supplemental jurisdiction question is worthy of the Supreme Court's attention is the fact that the Court previously granted certiorari on this issue. In *Free v. Abbott Labs.*, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed.2d 306 (2000), the Court granted certiorari to review the Fifth Circuit's en banc holding that § 1367 overruled *Zahn* and allowed courts to exercise supplemental jurisdiction over unnamed ¡ 'aintiffs in diversity-based class actions, *see Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir.1999) (en banc).

Justice O'Connor recused from the case, however, and the Fifth Circuit's ruling was affirmed by an equally divided Court in a per curiam opinion that did not contain any reasoning or explanation. Such a disposition has no precedential effect, and so was insufficient to resolve this contentious issue. *See Rutledge v. United States*, 517 U.S. 292, 304, 116 S.Ct. 1241, 1249, 134 L.Ed.2d 419 (1996) ("[A]n unexplained affirmance by an equally divided court [is] a judgment not entitled to precedential weight no matter what reasoning may have supported it.").

In the four years since *Free*, the depth of the controversy over § 1367 and the number of people it is adversely affecting has only grown. If the issue was worthy of the Court's attention in 1999, it is only more so today.

G. *No Substantial Factors Counsel Against Granting Certiorari in This Case*

It is possible for an otherwise "cert-worthy" case to have certain features that will cause the Court to overlook it. For example,

> [a] conflict will not necessarily result in the grant of certiorari if the issue is no longer a live one. . . . A conflict with a decision that has been discredited or that has lost all weight as authority by reasoning of inter-

> vening decisions of the Supreme Court or other courts of appeals . . . will not be an adequate basis for granting certiorari. . . . If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review. . . . If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied. . . . A related reason for denying certiorari is that the case at hand does not fairly present the legal question over which there is a conflict.

Stern, *supra* at 230-31. None of these factors are present in this case. As discussed earlier, *see* Section II.A, the split among the circuits is quite "live." Since § 1367 was enacted less than a decade and a half ago, none of the circuits' rulings are antiquated or in serious danger of being reversed. Similarly, because § 1367 involves a threshold jurisdictional issue, it is impossible for the Court to dispose of this case on an alternate ground without resolving this question; for the same reason, disposition of this issue can hardly be deemed "irrelevant" to the ultimate outcome of this case.

Justice Harlan enumerated some other factors that may cause the Court to deny certiorari:

> [E]ven where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing legal consequences, as where a statute which has given rise to conflicting interpretations has been repealed or amended.

Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 *Austl. L.J.* 108

(1959).[27] Again, these concerns are inapplicable here. Given the deep and abiding schism that has persisted for over a decade among district and circuit courts, it is unlikely that they will simply work it out among themselves in the absence of guidance from the Supreme Court. Moreover, § 1367 is still very much alive and well; this case is not about an academic disagreement over an irrelevant or moribund statute.

There are two concerns that warrant extended discussion, however. Subsection 1 argues that this issue does not require further "percolation" within lower courts before being addressed by the Supreme Court. Subsection 2 demonstrates that the supplemental jurisdiction matter is a general question of law and statutory interpretation rather than simply a fact-bound dispute.

1. *There is no need to allow this question to percolate in district and circuit courts any longer*—The Supreme Court will sometimes allow a circuit split to persist in order to allow an issue to further "percolate" in the lower courts. It is thought that "independent evaluation of a legal issue by different courts . . . allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Estreicher & Sexton, *supra* at 716; *see also* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the*

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[27] Another author has enumerated the following factors as precluding certiorari:

> (1) the presence of a spurious federal question, (2) the presence of a patently absurd question, (3) a request that the Supreme Court review a lower court's factual determination, and (4) a request that the Supreme Court review the sufficiency of the evidence upon which a judgment in the lower court was based.

Smith, *supra* at 756-57. As this opinion has attempted to demonstrate, the § 1367 issue is neither "spurious" nor "absurd." Moreover, as Subsection II.G.2 demonstrates, this is not a fact-bound issue unlikely to extend beyond the confines of this case.

Regional Design of the U.S. Courts of Appeals, 56 *U. Chi. L.Rev.* 603, 633 (1989) ("[I]t is important that the Supreme Court have the benefit of as much thinking on the question as is feasible before it makes this final resolution."). Whatever the general value of percolation for instant coffee or certain legal issues, it seems to be of no further importance in this case. *Cf.* Rehnquist, *Changing Role of the Supreme Court, supra* at 11 ("If we were talking about laboratory cultures or seedlings, the concept of issues 'percolating' in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live.").

As discussed earlier, eight courts of appeals, dozens of district courts, and scores of commentators and learned treatises have already spoken on this question and are no closer to reaching a consensus than they were over a decade ago when the question first arose. It seems that the arguments to be made on both sides of the issue have been forcefully and persuasively elucidated. Given the fact that the issue has already been simmering for well over a decade, there is little to be gained by allowing lower courts to continue issuing contradictory rulings.

Indeed, it is quite unlikely that there is some "hidden truth" about § 1367's true meaning hovering in the ether just waiting to be grasped by some unusually insightful district judge or appellate panel. Academic commentary is virtually unanimous that § 1367 is, to put it gently, a hopeless mess. The statute has been called "hurriedly conceived and poorly drafted." Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 *Ind. L.J.* 181, 185 (1998). Richard Freer has argued that it "is poorly drafted and creates unnecessary confusion, even for situations as to which the rules had been clear and consistent." Richard D. Freer, *Compounding Confusion and Hampering Diversity:*

Life After Finley and the Supplemental Jurisdiction Statute, 40 *Emory L.J.* 445, 446 (1991). Erwin Chemerinsky has opined that the statute "might be the result of unintended oversights or even a bit of sloppy drafting." Erwin Chemerinsky, *Perspectives on Supplemental Jurisdiction: Rationalizing Jurisdiction*, 41 *Emory L.J.* 3, 11 (1992). Things have degenerated to the point where "criticism [of § 1367] has become something of a cottage industry. It has ranged from attacks upon the good faith of the drafters to bad policy choices through misreading of precedents and sloppy drafting." Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute*, 74 *Ind. L.J.* 223, 231 (1998). In light of this virtually unanimous chorus of condemnation, it seems clear that the underlying problem is not with either the quantity or quality of judicial interpretations of § 1367, but with § 1367 itself. When a statute causes such confusion, there is little value in making lower courts grope about blindly for their best guess as to what it means, or what Congress may have intended.

Nevertheless, even if there *is* one "correct" interpretation of the statute, it can probably be found in the thousands of pages of court rulings and academic commentary that have already accumulated. Given the wide range of views and arguments (not to mention entire law review issues) that have already been put forth on this subject, it is quite likely that "the truth is out there." The Court should not defer adjudicating this issue on the basis that the best arguments have yet to be made. *See* Estreicher & Sexton, *supra* at 725 ("The Court should halt the percolation process . . . when the benefits to be derived from definitively resolving the conflict outweigh the benefits of further percolation."); Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 *Law Libr. J.* 193, 200 (noting that, according to one study, the Supreme Court typically grants certiorari where "there is no need or desire for more 'percolation' (or more extensive consideration) of

the issue by the lower courts or by others") (citing Perry, *supra* at 278). This is hardly a "novel question," and the sheer magnitude of existing precedent eliminates any fear that "premature resolution" of the issue will "stunt[ ] the natural growth and refinement of alternative principles." *California v. Carney*, 471 U.S. 386, 399, 105 S.Ct. 2066, 2073, 85 L.Ed.2d 406 (1985) (Stevens, J., dissenting).

"From a management perspective, it is useful to permit issues to 'percolate' through the system for a time, taking them at the Supreme Court level only when it is evident both that uniformity is required and that lower tribunals will not themselves reach that outcome, without guidance from above." Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *Colum. L.Rev.* 1093, 1109 (1987). Section 1367 is admittedly not quite the indecipherable inkblot or unintelligible Sanskrit that certain parts of the Constitution have been called. *See, e.g.*, Robert Bork, *The Tempting of America* 166 (1991). Nevertheless, as an empirical matter (whatever one may think about the clarity of the statute in the abstract), we are at the point where well-meaning judges are simply taking their best stabs at the language of § 1367 and coming to different conclusions. In many cases, judges are simply deploying contradictory canons of statutory interpretation and arriving at vastly disparate results. We do not need additional answers to this question from the lower courts—nor, to be frank, do we even need the *right* answer (though that would obviously be desirable)—but we simply need *an* answer. *See* Rehnquist, *Changing Role of the Supreme Court, supra* at 11 ("What we need is not the 'correct' answer in the philosophical or mathematical sense, but the 'definitive' answer, and the 'definitive' answer can be given under our system only by the court of last resort."). It is precisely because "Justices like the smell of well-percolated cases," Perry, *supra* at 230, that "[a]fter ten years of percolation, it is time for the [Court] to

smell the coffee." *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1093 (D.C.Cir.1992).

2. *This is not a fact-bound dispute*—Another major reason why the Court will frequently deny certiorari in a case is if the legal dispute is fact-bound—that is, if it arises primarily from a unique constellation of facts unlikely to frequently arise again. "The Court's job is to make law. . . . [Lower courts] cannot be brought into line by a Supreme Court decision that turns exclusively on the facts of one particular case. . . . [T]he Court prefers to take cases in which the facts are simple and clear and the legal issue is presented crisply." Stewart A. Baker, *Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari*, 33 *Cath. U.L.Rev.* 611, 616 (1984); Levinson, *supra* at 726 (noting that some certiorari petitions "are likely to be denied because they are essentially fact-bound").

The question of whether § 1367 permits courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions is a pure question of law. It can be resolved without regard to the specific facts of this case, and, as demonstrated earlier, *see supra* Subsections II.C.4, II.C.6, will impact a large number of people and cases far beyond the instant matter.

In conclusion, there are a variety of compelling reasons why the Court should grant certiorari in this case, including: the necessity of mending the interpretive chasm that has persisted in the federal judiciary for close to fifteen years, the objective importance of this issue, the critical need for a uniform interpretation of § 1367 across jurisdictions, and protecting the integrity of the Court's decisionmaking. Moreover, the Court's willingness to grant certiorari in *Free* is itself further evidence that this issue warrants its attention. In light of these considerations, I respectfully urge the Court to resolve this contentious matter.

III. Section 1367 Does Not Permit Courts to Exercise Supplemental Jurisdiction Over Unnamed Plaintiffs in Diversity-Based Class Actions

Throughout this opinion, I have been careful to avoid referring to the underlying merits of the supplemental jurisdiction issue because the Court does not grant certiorari merely to correct lower courts' errors.

> [T]he Court's statement in Rule 10 suggests that the Court does not perceive its function as correcting legal error in individual cases; rather, the Court has indicated that it intended to, and functions to, determine important issues of federal law, ensure compliance with Supreme Court precedents, ensure federal supremacy, and resolve conflicts between lower courts concerning federal questions.

Smith, *supra* at 743. As Justice Harlan emphasized, "The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter, is the fact a case may have been rightly decided in itself enough to preclude certiorari." Justice Harlan, *Manning the Dikes*, 13 *Rec. N.Y.C. Bar Ass'n* 541, 551 (1958); *see also Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (Rehnquist, C.J.) (noting that a grant of certiorari "depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review").

Nevertheless, should the Court grant certiorari in this case for the reasons articulated in Part II, it will have to come to a conclusion concerning the merits of this case. This Part briefly sets forth the reasons why I feel the panel below interpreted § 1367 incorrectly. A close reading of the statutory language demonstrates that supplemental jurisdiction is not available in diversity-based class actions. Moreover, even if one disputes my plain-meaning approach to these

provisions, my arguments reveal that the statute is sufficiently unclear to justify turning to the legislative history, which clearly and unambiguously demonstrates Congress's intent that *Zahn* remain good law. Congress did not wish to open the floodgates to an unbridled barrage of state-law litigation in federal court.

A. *The Meaning of § 1367(a)*

Section 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367. According to the clear language of this provision, supplemental jurisdiction may be invoked only in a "civil action of which the district court[ ] ha[s] original jurisdiction." *Id.* This phrase suggests that a party may not invoke supplemental jurisdiction under § 1367(a) unless the court already has original jurisdiction over each of the claims comprising that action.[28]

Under this understanding of the phrase, a district court can never exercise supplemental jurisdiction over unnamed

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[28] Of course, this is arguably an absurd interpretation of the statute because it would permit courts to exercise supplemental jurisdiction only in cases where it didn't need to, since some other form of jurisdiction exists over each of the claims in the complaint. It is precisely because a plain-text interpretation leads to such a bizarre that it is appropriate for us to refer to the legislative history to ascertain Congress's true intent.

plaintiffs pursuing state-law claims who fail to meet § 1332's amount-in-controversy requirement. The involvement of such unnamed class members precludes the court from having original jurisdiction over the whole civil action, which is a prerequisite for exercising supplemental jurisdiction. Consequently, while the court may have original jurisdiction over particular claims *within* that class action (specifically, the claims of plaintiffs who satisfy both of § 1332's jurisdictional requirements), it cannot exercise original jurisdiction over the civil action *as a whole* until the class members who fall beneath § 1332's amount-in-controversy requirement are dismissed from the case.

Some courts have held that the requirement of § 1367(a) is satisfied so long as the court has original jurisdiction over *any* of the claims specified in the complaint. However, a subsequent portion of § 1367(a) refers to particular "claims in the [civil] action" over which the court has original jurisdiction. When Congress wanted to refer to individual claims in a complaint, it knew how to do so; when Congress wanted to refer to the civil action as a whole (encompassing *all* the claims in the complaint), it apparently knew how to do so, as well.

At the very least, it is unclear whether my interpretation of the phrase "civil action of which the district court[ ] ha[s] original jurisdiction" or the interpretation implicitly adopted by the district court in the instant case is correct. This ambiguity requires us to turn to the legislative history to see if Congress intended that supplemental jurisdiction be available in diversity-based class actions.

The District Court for the Eastern District of California has cast another portion of § 1367(a) into question. Under § 1367(a), a person may invoke supplemental jurisdiction over a claim only if it is so related to the claims over which the court already has original jurisdiction that they form part of the "same case or controversy under Article III of the

United States Constitution." 28 U.S.C. § 1367(a). In *Snider v. Stimson Lumber Co.*, the court held:

> [A] class action involving separate and distinct claims by definition involves several or distinct rights. Class members can litigate these claims together, not because they are one case or controversy, but simply because the different claims [involve] common questions of law or fact. Accordingly, when class members assert separate and distinct claims, there are as many "cases or controversies" in a class action as there are class members. Simply put, claims related to those asserted by other class members may suffice to support recognition of a class, but that does not mean they form part of the same case or controversy under Article III of the United States Constitution within the meaning of 28 U.S.C. § 1367.

914 F.Supp. 388, 391 (E.D.Cal.1996) (second brackets in original; internal quotations and citations omitted).

While I do not agree entirely with this reasoning, it does cause me to question whether claims by unnamed class members necessarily form part of the "same case or controversy under Article III of the United States Constitution" as that presented by the named plaintiffs who satisfy § 1332's requirements. Some courts have held that this phrase simply requires that the class members' claims satisfy the *Gibbs* test; that is, they form part of the same constitutional "case or controversy" so long as they arise out of the same common nucleus of operative facts.[29] However, the equally plausible interpretation the district court gave this provision in *Snider*—along with confusion over § 1367(a)'s requirement that a court have original jurisdiction over a civil action—renders the true meaning of § 1367(a) sufficiently

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[29] *Gibbs* involved pendent state-law claims in a federal question case; the Court's opinion offers guidance in determining when such claims fall within the boundaries of a "case."

ambiguous as to warrant resort to the legislative history in order to ascertain whether Congress wanted it to apply to class actions.

B. *The meaning of § 1367(b)*

28 U.S.C. § 1367(b) states:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The panel opinion and the majority of circuits read the exceptions in § 1367(b) as forming an exclusive list. These courts argue that when a claim satisfying the requirements of § 1367(a) is joined to a case under a particular Federal Rule of Civil Procedure, a district court may exercise supplemental jurisdiction over that claim unless the Rule under which it is joined is expressly listed in § 1367(b). Since Rule 23 (the class action rule) is not in this list of exceptions to supplemental jurisdiction, courts are empowered to exercise supplemental jurisdiction over unnamed plaintiffs in such cases. *Allapattah*, 333 F.3d at 1255-56 ("The fact that Congress created explicit exceptions to § 1367(a)'s broad grant of supplemental jurisdiction but did not include Rule 23 among them leads us to conclude that it did not intend to prevent district courts from exercising supplemental jurisdiction over the claims of class members.").

There is nothing in the text of the statute, however, which indicates that the Rules mentioned in § 1367(b) were meant to constitute an exclusive list. Congress could easily have written the statute to specify that the Rules it mentioned are the "only" Rules under which supplemental jurisdiction is prohibited; it chose not to do so, however. The argument in the *Allapattah* panel's opinion is implicitly based upon the *expressio unius* canon of statutory construction.

I do not feel *expressio unius* is appropriate here. As the Supreme Court has repeatedly held, "The maxim expressio unius est exclusio alterius is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent." *Neuberger*, 311 U.S. at 88, 61 S.Ct. at 101; *see also Barnhart*, 537 U.S. at 168, 123 S.Ct. at 748 ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). The legislative history in this case provides clear evidence that Congress did not wish to overrule the holding in *Zahn* by allowing courts to extend supplemental jurisdiction to unnamed class members who failed to meet § 1332's amount-in-controversy requirement.[30]

Judge Pollak of the Eastern District of Pennsylvania pointed out a second way in which § 1367(b) is ambiguous. Like me, he questions "the assumption that the absence of a phrase—'Rule 23'—from a statute signifies conclusively that Congress intended that the phrase not be there." *Russ v. State*

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[30] As discussed above, the restrictions on supplemental jurisdiction contained in § 1367 pertain to people made parties to a lawsuit under certain specified rules of civil procedure. A troubling question concerning § 1367(b) is whether a plaintiff may be able to evade many of these restrictions by simply including such people in the original complaint (or in an amended complaint), rather than making them parties through the specified rules. I am dubious that jurisdictional restrictions could be circumvented through such procedural ploys.

Farm Mut. Auto. Ins. Co., 961 F.Supp. 808, 819 (E.D. Pa.1997). Judge Pollak points out that § 1367(b) contains references to various Rules of Civil Procedure. "[T]he text of [§ 1367(b)] is cast in a form—references by number to various Federal Rules of Civil Procedure--that makes that text, read in isolation, almost impenetrable to any audience other than specialists in civil procedure in the federal courts." *Id.* He argues that these references make it unlikely that most members of Congress would have understood, from the plain text of § 1367(b) alone, exactly what it is they were voting on.

> It is hard to believe that, in the Congress which enacted section 1367, there were any members other than the four who were also members of the Federal Courts Study Committee . . . who, in order to understand section 1367, would have looked to the words of the statute unless they were not furnished any extrinsic aid to understanding.

Id. He notes that "such extrinsic aid was at hand in the form of the House Judiciary Committee Report on H.R. 5381—a report whose detailed section-by-section analysis was made available to the Senate as well as to the House." *Id.*

Pollak's premise is indisputable—to understand § 1367(b), it is absolutely necessary to proceed beyond the four corners of the statute. It seems eminently reasonable to assume that, when forced to go beyond the statute itself to decipher its meaning, Members of Congress consulted the House Committee Report rather than to the actual Rules of Civil Procedure. Judge Pollak advocates that we use the same process to understand the meaning of § 1367(b) as the Members of Congress who enacted the statute used. Thus, another reason for turning to the legislative history is not so much because the statute is "ambiguous" as that word is customarily used, but, instead, because the statute does not

fully explain itself. We must go beyond the statute to understand the implications of its various cross-references.

C. *Legislative History*

In light of the reasons discussed throughout the preceding two sections, we should turn to the legislative history to determine whether supplemental jurisdiction under § 1367 is available for unnamed plaintiffs. It is also worth noting that the Third Circuit did not even depend on the existence of an ambiguity to justify its resort to legislative history. It held,

> Even were we to conclude that Section 1367 is unambiguous, as *Abbott Laboratories* read it, we would nevertheless turn to the legislative history because this is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir.1999) (brackets in original) (*quoting United States v. Sherman*, 150 F.3d 306, 313 (3d Cir.1998)). As Judge Pollak further pointed out, to exercise supplemental jurisdiction over such claims

> is to say to Congress: "We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: 'Gotcha! And better luck next time.'" Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.

Russ v. State Farm. Mut. Auto. Ins. Co., 961 F.Supp. 808, 820 (E.D.Pa.1997).

An examination of the legislative history reveals that Congress had no intention of either overruling *Zahn* or opening the doors of the federal courthouse to hundreds—perhaps

thousands—of unnamed plaintiffs with minuscule state-law claims piggybacking on the claim of a named plaintiff who happens to satisfy § 1332's amount-in-controversy requirement. On the floor of both the House and Senate, the bill containing § 1367 was consistently referred to by its sponsors as "noncontroversial." 136 *Cong. Rec.* S17578 (Oct. 27, 1990) (statement of Senator Grassley); *id.* at H13313 (Oct. 27, 1990) (statement of Congressman Kastenmeier). Senator Grassley claimed that the bill would not "represent major changes in the law." *Id.* at S17578. These assertions on the floor of Congress strongly suggest that § 1367 did not overturn the Supreme Court's holding in *Zahn*, undermine a firm understanding of diversity jurisdiction dating back to the 1800's, or open the doors of the federal courthouse to scores of small claims that would otherwise be in state court.

House Report No. 101-734 from the House Judiciary Committee was the only report addressing § 1367 produced by Congress; because the Senate adopted the report for its own use, it reflects the understanding of both houses of Congress. *See H. Rep.* No. 101-734 (Sept. 21, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6860; *see also* 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990) (adopting the House report for the Senate's use). The Supreme Court has declared, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984). Particularly because both houses of Congress relied on this report, we should accord it significant weight.

The committee report explained that it was intended to overrule the Supreme Court's holding in *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). It stated that § 1367

> would authorize jurisdiction in a case like *Finley* as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction. . . . In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*. *H. Rep.* No. 101-734, at 28-29, *reprinted in* 1990 U.S.C.C.A.N. at 6874-75. This pre-*Finley* understanding of supplemental jurisdiction, of course, includes *Zahn*. Far from criticizing *Zahn*, this report evidences Congress's intent to reinstate pendent party jurisdiction (in federal question cases brought under 28 U.S.C. § 1331), not to allow unnamed plaintiffs (in diversity cases brought under 28 U.S.C. § 1332) to deluge federal courts with minor claims.

The report goes on to state that, under § 1367, "In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute." *Id.* at 28, 1990 U.S.C.C.A.N. at 6874. Of course, the Supreme Court's holding in *Zahn* was an interpretation of the diversity statute; allowing supplemental jurisdiction over unnamed plaintiffs despite *Zahn*'s prohibition would necessarily be "inconsistent with the jurisdictional requirements of the diversity statute."

Perhaps most importantly, the report expressly explains that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions as those requirements were interpreted prior to *Finley*." *Id.* at 29, 1990 U.S.C.C.A.N. at 6875. This sentence ended with a footnote, *id.* at 28 n. 14, 1990 U.S.C.C.A.N. at 2874, that cites the Supreme Court's holdings in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673

(1921), and *Zahn v. International Paper, Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Thus, the committee report that was relied upon by both the House and the Senate expressly declares that § 1367 was not intended to overrule *Zahn*. The legislative history unambiguously demonstrates that § 1367 was not intended to affect the applicability of § 1332's amount-in-controversy requirement in class action suits. Particularly given the weight to which the Supreme Court accords committee reports, we are not at liberty to overlook this clear expression of congressional intent.

IV. Conclusion

For these reasons, I believe the panel erred in allowing courts to exercise supplemental jurisdiction under § 1367 over the claims of unnamed plaintiffs in diversity-based class actions who fail to meet § 1332's amount-in-controversy requirement. In light of the deep and abiding schism that has divided the federal judiciary for a decade and a half since the very enactment of this law, as well as the wide-ranging importance of this issue, the Supreme Court should grant certiorari.

APPENDIX B

UNITED STATES COURT OFAPPEALS,
ELEVENTH CIRCUIT

Nos. 01-15575, 01-16244

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

ROY PAGE, GLEBE ROAD EXXON, INCORPORATED,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant, Cross-Appellee.

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. NORTHLAKE EXXON, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees,

ROY PAGE, *et al.*,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida.

June 11, 2003

Before WILSON and FAY, *Circuit Judges*, and GOLDBERG,* *Judge*.

WILSON, *Circuit Judge*:

This case arises out of a class action suit filed by approximately 10,000 Exxon dealers who alleged that Exxon Corp. breached its dealer agreements by overcharging them for fuel purchases. Following a second trial, a jury returned a special verdict in favor of the dealers. After entering a final judgment for the class representatives and denying the dealers' motion for the entry of a class-wide judgment, the district court certified the following two questions for interlocutory appeal: (1) whether it properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process. Additionally, the court urged us to consider all of the legal issues raised by both parties relating to the disposition of the case. Thus, we also consider (1) whether Exxon is entitled to participate in the claims administration process; (2) whether Exxon may assert set-off claims against the dealers; (3) whether the district court abused its discretion by certifying the class; (4) whether the court erred when it admitted extrinsic evidence to supplement the Dealer Sales Agreements (dealer agreements); (5) whether the dealers'

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

claims were barred by the statutes of limitations; and (6) whether the court abused its discretion by allowing the dealers' expert witness to testify at trial. We find no reversible error and accordingly affirm.

BACKGROUND [1]

This suit was filed by a class of approximately 10,000 current and former Exxon dealers in thirty-five states who alleged that in connection with a marketing program known as the Discount for Cash (DFC) program, Exxon systematically and intentionally overcharged them for the wholesale purchase of motor fuel between March 1, 1983 and August 31, 1994. As a result of the overcharges, the dealers alleged that Exxon breached its obligations to them under the dealer agreements.

Under the DFC program, Exxon encouraged its dealers to implement a pricing system under which retail customers who paid cash for gasoline would pay a few cents less than customers who paid with credit cards. In an effort to maximize dealer participation in the program, Exxon began charging dealers a three-percent processing fee on sales of gasoline to consumers who paid by credit card, but promised to offset the charge by reducing the wholesale price that each dealer paid for gasoline. Exxon kept this promise for approximately six months and reduced the wholesale price by 1.7 cents per gallon. In March of 1983, however, it stopped providing the offset without informing the dealers. The dealers allege that by removing the offset without informing them, Exxon was able to overcharge them for gasoline during the class period.

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[1] A detailed summary of the facts underlying the dealers' suit is set forth in *Allapattah Services, Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308, 1310-13 (S.D.Fla.1999).

Upon discovering that the offset was no longer being provided, the dealers filed suit in May of 1991, and the case originally was tried to a hung jury in September of 1999. It was retried in January of 2001, resulting in a unanimous jury verdict in favor of the dealers. The jury found that Exxon breached its contractual obligations to the dealers and fraudulently concealed that breach. Following the return of the jury's verdict, Exxon filed posttrial motions for judgment as a matter of law and/or a new trial. The district court denied those motions, concluding that the evidence presented at trial was more than sufficient to support the verdict. The court further determined that, as a matter of law, the dealers were entitled to recover prejudgment interest in addition to their compensatory damages. Nevertheless, the court denied the dealers' motion for the entry of a final judgment for the class, concluding that it had no authority to enter an aggregate judgment because the jury had not awarded aggregate damages. Instead, the district court entered a final judgment for the class representatives and created an ad hoc claims process through which Exxon could contest each of the remaining class members' claims for compensatory damages.

Because the district court believed that its "order involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it certified the case for interlocutory review pursuant to 28 U.S.C. § 1292(b), asking us to resolve the following questions: (1) whether it properly exercised supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy; and (2) whether it was proper to enter judgment for the class representatives, but not for the class as a whole.

DISCUSSION

I. Supplemental Jurisdiction

The first question certified for interlocutory review by the district court was whether it had supplemental jurisdiction over the claims of all of the class members, including those who failed to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a). "[W]hether the district court had subject matter jurisdiction over [this action] is . . . subject to *de novo* review." *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755 (11th Cir.2000).

The district court's question forces us to address whether 28 U.S.C. § 1367, the supplemental jurisdiction statute, overrules the United States Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."[2]

Whether § 1367 overrules *Zahn* has been the subject of considerable debate among our sister circuits, which have split on the issue. *See Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir.2001) (holding "that § 1367 confers supple-

[2] We have raised this question before, but never answered it. In *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 n. 12 (11th Cir.2000), we declined to address the plaintiff's argument that § 1367 overrules *Zahn*, because "no member of the class ha[d] an individual claim that satisfie[d] the requisite amount in controversy." Shortly thereafter, in *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1273-74 (11th Cir.2000), we concluded that it was premature to address the question, because the named plaintiffs had not had an opportunity to establish that their claims met the jurisdictional minimum amount in controversy. We therefore remanded the case with instructions that the district court should consider whether § 1367 overruled *Zahn* if the plaintiffs carried their burden of proof on that issue. *Id.* Since that decision, no further opportunity to address the question has presented itself until now.

mental jurisdiction in diversity class actions, so long as one named plaintiff" satisfies the minimum amount in controversy requirement), *cert. dismissed*, 536 U.S. 979, 123 S.Ct. 14, 153 L.Ed.2d 878 (2002); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 934 (9th Cir.2001) (holding the same), *cert. denied*, 534 U.S. 1104, 122 S.Ct. 903, 151 L.Ed.2d 872 (2002); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930-31 (7th Cir.1996) (holding that § 1367 authorizes a district court to exercise supplemental jurisdiction over a party that does not satisfy the minimum amount in controversy);[3] *In re Abbott Labs.*, 51 F.3d 524, 528-29 (5th Cir.1995) (holding that as long as the class representatives meet the amount in controversy requirement, a district court may exercise supplemental jurisdiction over the members of the class who do not). *But see Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir.2000) (holding that *Zahn* remains viable and that each member of a class must meet the requisite jurisdictional amount in controversy); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir.1999) (finding the text of § 1367 ambiguous and relying upon legislative history to hold that § 1367 preserves *Zahn*); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640 (10th Cir.1998) (holding that § 1367 unambiguously preserves *Zahn*). Upon our own review, we agree with our sister circuits that have held that the language of § 1367 clearly and unambiguously overrules *Zahn* and allows a district court

[3] *Stromberg Metal Works, Inc.* was not a class action suit; it involved two plaintiffs, only one of whom satisfied the amount in controversy. 77 F.3d at 930. The Seventh Circuit subsequently applied *Stromberg Metal Works, Inc.* to a class action suit in *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir.1997). The Seventh Circuit held in that case that "[a]t least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim." *Id.* at 607.

entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount in controversy requirement.[4]

In addressing this question, "we begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir.2002) (en banc). "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir.1997). This is so because "'[we] must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

Section 1367(a) provides,

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

[4] We are unpersuaded by Exxon's argument that "[t]he 'fact that a statute has been interpreted differently by different courts is evidence that the statute is ambiguous and unclear.'" The mere existence of a split among the circuits as to the proper interpretation of § 1367 does not relieve us of our obligation to interpret the statute independently. *See Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir.1989) ("Under the established federal legal system the decisions of one circuit are not binding on other circuits."); *see also Rosmer*, 263 F.3d at 118 ("[W]e cannot allow the fact that other circuits have called a statute ambiguous to negate this circuit's duty to interpret the text of the enactment.").

28 U.S.C. § 1367(a). Section 1367(b) continues,

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Id. § 1367(b).

We believe that it is clear from the plain language of the statute that § 1367(a) is a general grant of supplemental jurisdiction, which is then narrowed for diversity cases by § 1367(b).[5] In considering whether the district court's

[5] Exxon argues that "the text and structure of § 1367[sic] preserve the jurisdictional requirement of *Zahn*." In so arguing, however, it essentially asks us to construe § 1367 in such a way as to apply only where the court already has original jurisdiction over every class members' claim. We do not believe that the statute can be read to suggest this. If a district court is required to have original jurisdiction over every class members' claim, the last sentence of § 1367(a), providing that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of *additional parties*" would be superfluous. 28 U.S.C. § 1367(a) (emphasis added). There would be little reason for the statute to provide for the exercise of claims involving the joinder of additional parties if the district court first were required to have original jurisdiction over those claims. We therefore cannot read the statute in this way. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir.1999) (providing "that courts should disfavor interpretations of statutes that render language superfluous" (internal quotation marks omitted)).

Additionally, Exxon argues that the legislative history of § 1367 "confirms Congress' [sic] intent to preserve *Zahn* and prior cases." We, however, see no need to parse the legislative history to divine

exercise of supplemental jurisdiction over the dealers' claims was proper, we therefore first must determine whether the dealers satisfied the requirements of § 1367(a). The parties agree that the district court had original jurisdiction over the class representatives' claims, because they satisfied the $50,000 jurisdictional minimum amount in controversy requirement.[6] Section 1367(a) therefore authorized the court to exercise supplemental jurisdiction over those claims that were so closely related to the original claims that they "form[ed] part of the same case or controversy." *Id.* § 1367 (a). Because the dealers' claims arose from the same agreements and contractual obligations as the class representatives' claims, the requirements of § 1367(a) were satisfied.

Thus, the district court was entitled to exercise supplemental jurisdiction over the dealers' claims pursuant to § 1367(a) unless those claims fell within one of the exceptions listed in subsection (b), which explicitly prevents courts from exercising supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14, 19,

congressional intent with respect to § 1367, because we consistently have reiterated that the text of a statute controls and that we may not "consider legislative history when the statutory language is unambiguous." *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir.2002) (per curiam), *cert. denied*, 71 U.S.L.W. 3367, 2003 WL 21210593 (U.S. Nov. 8, 2002) (No. 02-728); *see also Harry*, 291 F.3d at 772 ("Even if a statute's legislative history evinces an intent contrary to its straightforward statutory command, we do not resort to legislative history to cloud a statutory text that is clear" (internal quotation marks omitted).); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir.2000) (en banc) ("When the import of the words Congress has used is clear . . . , we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language."), *cert. denied*, 532 U.S. 1065, 121 S.Ct. 2214, 150 L.Ed.2d 208 (2001).

[6] The minimum amount in controversy has been raised to $75,000. *See* 28 U.S.C. § 1332.

20, or 24 of the Federal Rules of Civil Procedure."[7] *Id.* § 1367(b). Notably, Federal Rule of Civil Procedure 23, which pertains to class actions, is not one of the enumerated exceptions. Exxon argues that because § 1367(a) requires that the district court have original jurisdiction over each member of the class, "it would have been redundant for Congress to enumerate Rule 23 as a specific exclusion from *supplemental* jurisdiction in § 1367(b) [sic]." We disagree. The fact that Congress created explicit exceptions to § 1367(a)'s broad grant of supplemental jurisdiction but did not include Rule 23 among them leads us to conclude that it did not intend to prevent district courts from exercising supplemental jurisdiction over the claims of class members. Indeed, it is a well-accepted rule of statutory construction in this Circuit that "where a statute explicitly enumerates certain exceptions to a general grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir.1991). Because we do not believe that the text of the statute expresses any legislative intent to prevent district courts from exercising supplemental jurisdiction in diversity class actions, we decline to "rewrite the statute to insert Rule 23 into § 1367(b)'s list of exceptions." *Rosmer*, 263 F.3d at 115; *see also Harris v. Garner*, 216 F.3d 970, 976 (11th Cir.2000) (en banc) ("We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it."), *cert. denied*, 532 U.S. 1065, 121 S.Ct. 2214, 150 L.Ed.2d 208 (2001).

[7] Section 1367(a)'s grant of supplemental jurisdiction also is subject to the exceptions enumerated in subsection (c), but that subsection relating to discretionary jurisdiction is inapplicable to this case. *See* 28 U.S.C. § 1367(a).

Thus, we find that § 1367 clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has original jurisdiction over the claims of at least one of the class representatives. We therefore conclude that § 1367 overrules *Zahn*.

II. Entry of Judgment

We now turn to the second issue certified for interlocutory review—whether the district court should have entered an aggregate judgment for the dealers based upon the jury's verdict finding Exxon liable to the dealers.[8] Because we do not believe that an aggregate final judgment was warranted in this case, we also must address the following issues raised in the dealers' cross-appeal: (1) whether the district court erred by determining that Exxon is permitted to participate in the claims process; and (2) whether it is proper to allow Exxon to assert set-off claims during the claims process.

A. Aggregate Judgment

The dealers argue that once the jury returned a verdict in their favor, the district court should have entered a final judgment awarding aggregate damages to the

[8] Exxon also argues that it was inappropriate for the district court to enter individual final judgments for each of the named class representatives, because no reasonable jury could have found that Exxon breached its obligations under the dealer agreements. Exxon's argument, however, is little more than an attack on all of the factual findings made by the jury. As we find that the jury's verdict was supported by substantial evidence, Exxon's argument is without merit. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154 (11th Cir.2002) ("A verdict must stand unless there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue" (internal quotation marks omitted).).

class.[9] Although they acknowledge that the jury did not award aggregate damages, the dealers argue that the court could have calculated the total amount of damages on its own and entered a judgment reflecting that amount. Assuming arguendo that the district court had the authority to calculate the dealers' damages and enter an aggregate judgment, we do not believe that it would have been appropriate for the court to exercise that authority in this case.[10]

As an initial matter, we note that our consideration of whether an aggregate final judgment is appropriate in this case is complicated by the lack of case law pertaining to this issue. Therefore, like the district court, we find ourselves without much guidance from other courts. Upon our own review, however, we agree with the district court that this is not the ideal case for the entry of an aggregate final judgment, because several significant obstacles prevent the entry of such a judgment. Moreover, we do not believe that an aggregate judgment would benefit the class greatly or result in a more expedient disposition of each dealer's claim.

Although we believe that Exxon's liability to the dealers was decided properly on a class-wide basis, we agree with the district court that the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled. Such individualized proof of claims would be necessary regardless of whether an aggregate judgment was entered, and the considerations that must be taken into account to

[9] We review the district court's denial of judgment for the class and entry of judgment in favor of the class representatives de novo. *See Maytronics, Ltd. v. Aqua Vac Sys., Inc.*, 277 F.3d 1317, 1320 (11th Cir.2002).

[10] Although we make this assumption, we express no opinion as to whether a district court has the authority to enter an aggregate judgment in a class action suit when the jury has not awarded aggregate damages.

calculate the correct amount of damages during the claims process reveal the obstacles to entering an aggregate judgment for the class. These obstacles include (1) accounting for those dealers who either have opted out of the class or not submitted claims; (2) accounting for those dealers whose claims were barred by the Ohio statute of limitations; (3) the difficulty of awarding prejudgment interest on a class-wide basis when the applicable amount of interest varies from state to state; and (4) determining whether the dealers' claims are subject to further reduction by set-off claims asserted by Exxon.[11]

In light of these obstacles, we believe that the district court's decision not to enter an aggregate judgment was proper, because the judgment would not have expedited or simplified the claims process. Indeed, it appears that the entry of an aggregate judgment would complicate the claims process further, and we believe that the only real effect of entering an aggregate judgment in this case would have been to set aside a large pool of money, which would have accumulated interest while the claims process took place.[12] Even if the funds were deposited immediately into an escrow account, the dealers would not benefit greatly from having the money set aside, because they would not be entitled to receive their individual shares of compensatory damages until after their claims had been proven.

[11] We will address the dealers' arguments with respect to the statutes of limitations in Section III(C) and the set-off claims in Section II(C).

[12] There is a high probability that an aggregate award of damages would have resulted in a substantial pool of unclaimed funds at the conclusion of the claims process. Before the district court and on appeal, the dealers raised the issue of whether Exxon would be entitled to reverter of the funds remaining at the conclusion of the claims administration process. Because we determine that an aggregate final judgment is not appropriate in this case, we need not address this issue.

We thus find no compelling justification for the entry of an aggregate final judgment in this case, and the dealers have pointed us to no authority suggesting that the entry of such a judgment was required.[13] Therefore, we conclude that, under the facts of this case, the district court's refusal to enter an aggregate final judgment for the class did not constitute reversible error.

B. Exxon's Right to Participate in the Claims Process

The district court determined that Exxon had a right to participate in the claims administration process, because it was a real party in interest and would have to pay the damages due as a result of the verdict and claims process. In light of that process, it determined that Exxon would be permitted to file objections to each dealer's claim contesting (1) whether the dealer actually was a dealer during the class period; (2) whether the dealer's claim was subject to a statute of limitations defense or barred by a release; (3) whether the amount of compensatory damages and prejudgment interest to which each dealer was entitled was calculated properly; and (4) whether the dealer's claim was subject to reduction by one of Exxon's set-off claims.

The dealers argue that Exxon had no right to participate in the claims process, because the determination of liability

[13] We note that this was not a case in which an aggregate award was authorized based upon the violation of a statute. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (allowing the class to submit aggregate proof of damages for violations of the Farm Labor Contractor Registration Act where the class sought statutory rather than actual damages and individual proof of damages was not required for recovery). This also was not a case in which the precise aggregate damages of the class could be ascertained easily by a simple mathematical calculation. *See Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir.1977) (determining that the class's aggregate damages could be calculated by multiplying the number of unconverted debentures by the difference between the value and redemption price of the stock).

already had been made and the only remaining issue in this case was how to distribute the damages. In so arguing, the dealers rely primarily upon the Supreme Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), in which the Court held that Boeing Co. did not have a present interest in the damage fund that was to be distributed to a class of investors. We, however, believe that *Boeing Co.* is inapposite to this case.

In *Boeing Co.*, an investor class action suit, Boeing Co. did not appeal the district court's entry of a judgment for the class. *Id.* at 479 n. 5, 100 S.Ct. 745. Rather, its appeal was narrowly tailored to the issue of whether attorney's fees could be awarded from the portion of the judgment fund that remained unclaimed at the conclusion of the claims process. *Id.* at 477, 100 S.Ct. 745. The Supreme Court determined that "[t]he judgment on the merits stripped Boeing of any present interest in the fund" and thus concluded that Boeing Co. had no interest in the litigation between the class and its attorneys regarding attorney's fees. *Id.* at 481 n. 7, 100 S.Ct. 745. The Court, however, acknowledged that "Boeing did have an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be assessed against the entire fund rather than against the portion actually claimed." *Id.*

Thus, we believe that the dealers' reliance upon *Boeing Co.* is misplaced. Contrary to the dealers' assertions, that decision does not suggest that a defendant has no interest at all in the postverdict resolution of class claims; rather, it suggests that a defendant has no interest in how the class members apportion and distribute a damage fund among themselves. *Id.; see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."). In this case, however, no damage fund has been created and

there are several issues that must be resolved during the claims process. As one commentator noted in addressing individual issues among class members,

> If the only issue is to determine the amount of damages which class members are entitled to receive and this determination can be accomplished almost mechanically, simple proofs similar to those used for summary judgment are often appropriate, . . . especially when individual claims are small or relatively modest . . . .
>
> On the other hand, when large claims are involved, . . . one would expect that they would be more hotly contested by the defendants and more vigorously asserted by the claimants. The economic stakes being more substantial in large claims, fairness dictates that the procedures should allow for a more formal adversary proceeding.

3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 9:64, at 457-58 (4th ed.2002). Because Exxon has certain defenses to each dealer's claim, we believe that an adversarial claims process is warranted in this case. We therefore conclude that Exxon still has a present interest in the claims process, and due process requires that it be allowed to participate in that process.

C. Exxon's Right to Assert Set-Off Claims

Having determined that Exxon has a right to participate in the claims process, we must address the dealers' argument that the district court erred when it determined that Exxon could assert set-off claims against the dealers during the claims process, because its set-off claims were untimely raised.

Several federal courts have determined that the appropriate time for a class action defendant to raise affirmative defenses and set-off claims is during the damages phase of the action. *See Aamco Automatic Transmissions, Inc. v. Tayloe*, 67

F.R.D. 440, 450 (E.D.Pa.1975) (determining that the defendant's counterclaims "could be effectively presented when individual claims for damages are presented"); *Serpa v. Jolly King Rests., Inc.*, 1974 WL 941 (S.D. Cal.1974) ("Once liability is established and claims for damages filed, then and only then, may the defendants raise specific and detailed counterclaims to offset the damage claims."); *Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 489-90 (S.D.N.Y. 1973) ("If liability is established, other issues, including damages and counterclaims, can be handled on a class member-by-class member basis."). We agree with the reasoning of those courts and therefore find that Exxon was not required to assert its set-off claims in its answer.[14] Thus, the district court did not err in holding that Exxon can raise those claims during the claims administration process.

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[14] Ordinarily, a party must assert a counterclaim in its pleadings. *See* Fed.R.Civ.P. 13. Rule 13, however, is inapplicable in class action suits, because "absent class members are not opposing or litigating adversaries for purposes of Rule 13." *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc.*, 238 F.Supp.2d 963, 967 (S.D.Ohio 2003) (internal quotation marks omitted). As one commentator has explained,

> Rule 13 expressly is applicable only to opposing parties.
>
> A court may properly conclude that absent class members are not opposing or litigating adversaries for purposes of Rule 13, and therefore Rule 13 is inapplicable in a class context. Because compulsory counterclaims can only be potentially involved when Rule 13 applies, if absent class members are not opposing parties within the meaning of the rule, it follows that any counterclaims that may be permitted in a class action are not governed by Rule 13 and *are purely discretionary with the court.*

2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:34, at 299-300 (4th ed.2002) (emphasis added). Thus, the district court had discretion to decide whether Exxon should be allowed to assert set-off claims against the dealers.

III. Exxon's Remaining Claims

Having answered the two certified questions, we now address the following additional issues raised by Exxon: (1) whether the class should have been certified; (2) whether the district court should have permitted the jury to consider extrinsic evidence pertaining to the dealer agreements; (3) whether the dealers' claims were barred by the applicable statutes of limitations; and (4) whether the district court should have admitted the testimony of the dealers' expert witness.

A. Class Certification

Exxon argues that the district court erroneously certified and tried this case as a class action pursuant to Rule 23(b)(3). Exxon maintains that as a result of this improper certification, each dealer's claim and Exxon's affirmative defenses were resolved on the basis of a single set of facts, ignoring the unique factual and legal issues relevant to the claims of each individual class member.

"We review the district court's grant of class certification for an abuse of discretion." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir.1996). "A class action may be maintained only when it satisfies all the requirements of Fed.R.Civ.P. 23(a) and at least one of the alternative requirements of Rule 23(b)."[15] *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir.2000) (internal quotation marks omitted), *cert. denied sub nom. Zeirei Agudath Isr. Bookstore*, 532 U.S. 919, 121 S.Ct. 1354, 149 L.Ed.2d 285 (2001). The district court certified this class under Rule 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate

[15] Exxon does not challenge the district court's finding that the class met the requirements of Rule 23(a).

over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3).

"[T]o determine whether common questions predominate, we are called upon to examine the cause[ ] of action asserted in the complaint on behalf of the putative class." *Rutstein*, 211 F.3d at 1234 (alteration in original) (internal quotation marks omitted). The common issues among the class in this case were (1) whether the DFC program imposed an obligation on Exxon to reduce wholesale prices; (2) whether Exxon breached that obligation when it failed to continue providing the offset to the dealers; and (3) whether Exxon fraudulently concealed that breach. If these issues were subject to generalized proof and predominated over the individual issues raised by Exxon's affirmative defenses, class certification was proper. *See In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C.2002) ("[I]n general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position" (internal quotation marks omitted).).

Contrary to Exxon's argument, we do not believe that this case is one "where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." *Rutstein*, 211 F.3d at 1235-36 (internal quotation marks omitted). Exxon's primary argument in support of its contention that the class should not have been certified is that there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses. We find that Exxon's argument that each breach of contract claim raised an individual issue is without merit. Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a

question common to the class and the issue of liability was appropriately determined on a class-wide basis.

Thus, the real question for the district court was whether the common issue of liability predominated over the individual issues raised by Exxon's affirmative defenses, which pertained primarily to the issue of damages rather than liability. In similar situations, numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir.2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues"), *cert. denied sub nom. Visa U.S.A. Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917, 122 S.Ct. 2382, 153 L.Ed.2d 201 (2002); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir.2001) ("Although calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue"); *Tayloe*, 67 F.R.D. at 450 ("[I]n the event of a finding of liability, damages might have to be established on an individual basis. This fact alone, however, does not preclude class action treatment."). We agree. Based upon the facts of this case, we believe that Exxon's liability to the class for breach of the dealer agreements predominated over the individual issues relating to damages. Thus, the district court did not abuse its discretion in certifying the class.

B. Extrinsic Evidence

Exxon argues that the district court impermissibly allowed the jury to consider extrinsic evidence in determining whether Exxon breached its obligations under the dealer agreements.

"What a contract provision means, or whether it is ambiguous, are questions of law, which we review *de novo*." *Reynolds v. Roberts*, 202 F.3d 1303, 1313 (11th Cir.2000).

Generally, "parol evidence is admissible to prove the elements of an agreement [only] where a writing is ambiguous on its face or fails to contain the elements of a complete contract." *Indus., Invs. & Agencies (Bah.) Ltd. v. Panelfab Int'l Corp.*, 529 F.2d 1203, 1211 (5th Cir.1976). Under the Uniform Commercial Code (UCC), however, extrinsic evidence of the parties' "course of dealing or usage of trade" or "course of performance" may be used to explain or supplement the writing. U.C.C. § 2-202(a). The UCC therefore rejects the common law rule that parol evidence is admissible only where the terms of a contract are ambiguous. *See id.* § 2-202, cmt. n. 1(c); *see also Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 8 (4th Cir.1971) (recognizing that the UCC changed the common law rule "that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous").

In this case, the district court determined that because Exxon was accused of breaching its contractual duty of good faith in setting its wholesale prices, evidence pertaining to "Exxon's adoption and implementation of the DFC program, the unilateral amendment of its dealers' credit card agreements, its official public explanation of its performance obligation and its claimed history of meeting its performance obligations to its dealers" was relevant evidence of the manner in which Exxon set its prices during the period in which the DFC program was in effect. *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300, 1306 (S.D.Fla.1999). The court thus believed that such evidence would assist the jury in determining whether Exxon breached its duty under the dealer agreements. We agree and conclude that the district court correctly determined that the dealers could use extrinsic

evidence to explain the nature of Exxon's good faith obligation to the dealers.[16]

C. Statutes of Limitations

Exxon contends that the district court erred when it found that, with the exception of the Ohio dealers, none of the dealers' claims were barred by the applicable statutes of limitations.[17] Exxon posits that most jurisdictions required

[16] Exxon also argues that the district court erred in submitting whether this case constituted a normal case under the UCC to the jury. With respect to open-price terms, section 2-305(2) of the UCC provides that "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith." U.C.C. § 2-305(2). The official comment to section 2-305(2) provides that "[g]ood faith includes observance of reasonable commercial standards of fair dealing. . . . But in the normal case, a posted price or a . . . price in effect . . . satisfies the good faith requirement." *Id.* § 2-305, cmt. n. 3 (internal quotation marks omitted). Exxon argues that because the dealers were charged Exxon's price in effect at the time of fuel deliveries, it satisfied the good faith requirement. The dealers alleged, however, that this case was not a normal case, because Exxon was attempting to drive some of the dealers out of business, and, therefore, Exxon did not satisfy the good faith requirement. We agree with the district court that whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith. It therefore was a question for the jury.

Exxon further argues that even if this were a question for the jury, the district court erred in giving the jury an instruction defining the term "normal" in accordance with the dictionary definition. Exxon, however, acknowledges that the UCC does not define what constitutes a "normal" case, and Exxon does not suggest any alternative definition that would have been more suitable. We previously noted that "to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir.2001). We therefore do not believe that the district court erred in defining the word "normal" by providing the jury with the dictionary definition of the term "normal."

[17] After reviewing the relevant law in each jurisdiction, the court determined that fraudulent concealment was not a defense to the statutes of limitations in Ohio and Florida. After the trial, however, the court noted

that a breach of contract action be brought within four years of the breach and that most of the dealers' claims occurring prior to May of 1987 were barred, because the dealers did not file suit until May of 1991. The dealers, however, allege that the statutes of limitations were tolled, because Exxon fraudulently concealed its breach.

The district court determined that whether Exxon fraudulently concealed its breach was a question of fact for the jury. After the jury returned its verdict, in which it found that Exxon fraudulently concealed its breach, Exxon filed a motion for a judgment as a matter of law or, in the alternative, a motion for a new trial based in part upon its contention that the dealers did not prove the elements of fraudulent concealment. The court, however, found that the dealers presented "clear and convincing" evidence that Exxon fraudulently concealed its breach and denied the motion.

"A district court's denial of a motion for judgment as a matter of law is reviewed by this court *de novo*." *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1176 (11th Cir.2002). The motion should be granted "only if there was no legally sufficient basis for a reasonable jury to find in favor of the nonmoving party." *Id.* at 1176-77 (internal quotation marks omitted).

After a careful review of the record, we believe that the evidence presented at trial was sufficient to support the jury's finding that Exxon fraudulently concealed its breach of the dealer agreements. The dealers presented evidence that each year, at annual meetings between Exxon executives and dealer representatives, the executives told the dealers that the DFC offset still was being provided even though the

that a recent Florida Supreme Court decision changed the law in Florida pertaining to the delayed discovery doctrine. Based upon that change in the law, the court concluded that the Florida dealers' claims were not barred by the statute of limitations.

executives knew otherwise. Although these statements were not made to each individual dealer, they were made to the dealer representatives who in turn were asked to report to their constituent dealers what was discussed at the meetings. Exxon argues that the dealers presented no evidence at trial that the representatives actually did report back to their constituent dealers, but two Exxon executives testified that the minutes of each annual meeting were sent to each dealer representative with the intention that they then be mailed to each individual dealer. This evidence was sufficient for the jury to find that the Exxon executives' statements regarding the DFC program were disseminated among the dealers and that the dealers relied upon those representations.

Because we find that there was a legally sufficient basis for finding that Exxon fraudulently concealed its breach, thereby tolling the statutes of limitations, we conclude that Exxon was not entitled to a judgment as a matter of law or a new trial upon that basis.[18]

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[18] Additionally, Exxon argues that the district court erred by failing to enforce written releases signed by approximately 5193 of the dealers at the end of their respective terms as Exxon dealers. The releases purported to release both parties from any and all causes of action arising out of or in connection with the dealer agreements. The district court determined that, like the dealer agreements, the releases were governed by the UCC and therefore were subject to the same duty of good faith as the dealer agreements. It thus concluded that the releases would be voidable if the jury found that Exxon breached its duty of good faith and fraudulently concealed its breach.

It is well settled that a party's fraud can render a release voidable. *See, e.g., Kobatake v. E.I. DuPont De Nemours & Co.*, 162 F.3d 619, 625 (11th Cir.1998) (per curiam) (applying Georgia law); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314-15 (5th Cir.1983) (recognizing that fraudulent inducement or concealment can void a release). Because we believe that the jury's finding that Exxon fraudulently concealed its breach was supported by substantial evidence, we conclude that the releases signed by the dealers were voidable, with

D. Expert Testimony

Exxon argues that the district court erred in admitting the testimony of Dr. Raymond Fishe, the dealers' expert witness, because he had no specialized knowledge of pricing systems in the petroleum industry and his methodology was flawed.

"We review a trial court's evidentiary rulings on the admission of expert witness testimony for abuse of discretion." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir.2000). The district court conducted an extensive six-day hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After the hearing, at which the court heard testimony from both parties' expert witnesses, it entered a lengthy order determining that (1) both parties' expert witnesses were qualified to testify; (2) the methodologies of both experts were sufficiently reliable; and (3) the experts would assist the jury in understanding the issues at trial. Based upon these determinations, the court concluded that each expert met the requirements of *Daubert* and Federal Rule of Evidence 702.

Given the district court's exhaustive effort in determining that Dr. Fishe's methodology was reliable, we do not believe that it abused its discretion in allowing him to testify at trial where Exxon was able to cross-examine him fully and refute his testimony through the use of its own expert witness.

CONCLUSION

Thus, we join with the Fifth, Seventh, Ninth, and Fourth Circuits in ruling that § 1367 authorizes the exercise of supplemental jurisdiction in a diversity class action over claims that do not meet the minimum amount in controversy requirement, overruling the Supreme Court's holding in

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the exception of the Category-four releases signed by certain Delaware dealers, which the district court determined were enforceable.

Zahn. It therefore was appropriate for the district court to exercise jurisdiction over the claims of those class members whose claims did not meet the $50,000 minimum amount in controversy requirement. We further find that the district court did not err in denying the dealers' motion for entry of an aggregate final judgment and devising an appropriate procedure for the administration of each dealer's claim. With respect to each of the remaining issues raised by the parties, we find no reversible error. Accordingly, we AFFIRM.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 23, 2001]

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

UNITED STATES MAGISTRATE
JUDGE ANDREA M. SIMONTON

AMENDED

FINAL JUDGMENT ON JURY VERDICT
FOR NAMED PLAINTIFFS

This action came on for trial before the Court and a jury, Honorable Alan S. Gold, presiding. The issues have been duly tried and the jury has duly rendered its verdict. For the reasons stated in the Court's August 7, 2001 Order on Procedure Determination and Entry of Final Judgment, the Court finds that there is no just reason for delay in entering a final judgment on behalf of the named plaintiffs in this action.

Accordingly, pursuant to Rule 54(b), Fed. R. Civ. P., it is Ordered and Adjudged, and the Court directs entry of a Final Judgment, that the named Plaintiffs, Robert Lewis Inc., G.G.S.K. Inc., G.G.S.K.1 Inc., John Pinder, Lee-Langley

Corp,. Martin I. Cook, David Wise, Willston Center Autocare, Inc., Rylyns Enterprises Inc. and Allapattah Services, Inc. shall recover of the Defendant, Exxon Corporation compensatory damages and prejudgment interest in the following amounts:

Plaintiff	Compendatory Damages	Prejudgment Interest	Total Damages
1. Robert Lewis, Inc.	$70,678.00	$87,969.00	$158,647.00
2. G.G.S.K. Inc.	$42,007.00	$58,287.00	$100,294.00
3. G.G.S.K.1 Inc.	$90,610.00	$105,678.00	$196,288.00
4. John Pinder	$103,594.00	$159,015.00	$262,609.00
5. Lee-Langley Corp.	$186,573.00	$192,218.00	$378,791.00
6. Martin I. Cook	$207,522.00	$238,107.00	$445,629.00
7. David Wise	$116,178.00	$134,192.00	$250,370.00
8. Willston Center Autocare, Inc.	$96,556.00	$97,567.00	$194,123.00
9. Rylyns Enterprises Inc.	$257,194.00	$155,793.00	$412,988.00
10. Allapattah Services, Inc.	$43,057.00	$52,335.00	$95,392.00

with interest thereon at the rate provided by law.

The Court reserves jurisdiction to award and allocate taxable costs, reimbursable expenses, attorney's fees and class representative incentive awards, to administer the determi-
nation of damages of class members, and for such further relief as is just and proper with respect to their named Plaintiffs and the Class as a whole.

Dated this 10th day of October, 2001.

Clarence Maddox
CLERK OF COURT

by: /s/ [Illegible]
JACOB M. HASBUN, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 91-0986-CIV

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

Aug. 7, 2001

ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT

GOLD, *District Judge*.

I. *INTRODUCTION*

On February 20, 2001, the jury rendered a Special Verdict in favor of the Class Dealers [D.E. # 1395].[1] Following the

[1] The jury's Special Verdict is the culmination of a long and arduous process which began in 1991 and resulted in a mandamus proceeding before the Eleventh Circuit Court of Appeals, two jury trials, and the rendition of numerous substantive court orders. *See, e.g.*, April 21, 1998 *Order Denying Exxon's Motion for Summary Judgment On Count I* (Kehoe, J.) [D.E. # 908]; *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300 (S.D.Fla.1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D.Fla.1999) (setting forth the essential facts of the dispute); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D.Fla.1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335 (S.D.Fla.1999); and *Allapattah Servs., Inc. v. Exxon Corporation*, 188 F.R.D. 667 (S.D.Fla.1999).

rendition of the Special Verdict, the Court held a status conference with the parties on March 1, 2001, to discuss post-verdict procedures, the entry of judgment, and the claims administration process. At the direction of the Court, the parties have filed a series of motions and memoranda addressing complex and novel matters of first impression since, as recognized by the parties, few class matters of this magnitude have proceeded to trial and verdict.[2] On June 7, 2001, the Court held oral argument and further directed the parties to file additional memoranda on certain specific issues [D.E. # 1427]. All such memoranda have been received and reviewed.[3]

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[2] *See* Plaintiffs' Memorandum on Proposed Post Trial Procedures [D.E. # 1400], filed on February 28, 2001; Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1409], filed on March 30, 2001; Plaintiffs' Memorandum in Support of Plaintiffs' Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1421], filed on May 25, 2001; Plaintiffs' Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination of Final Judgment [D.E. # 1424], filed on June 4, 2001; and Plaintiffs' Reply Memorandum In Support of Discretionary Award of Prejudgment Interest [D.E. # 1433], filed on June 21, 2001. *See also* Exxon Corporation's Proposed Orders, Objections and Requests for Briefing Schedule and Hearing [D.E. # 1397], filed on February 26, 2001; Submission of Defendant Exxon Corporation with Respect to Hearing Regarding Proposed Judgment and Post-Trial Proceedings [D.E. # 1399], filed on February 28, 2001; Response of Exxon Corporation in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1416], filed on May 11, 2001; and Response of Exxon Corporation to Plaintiffs' Submission Regarding Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1423], filed on June 4, 2001.

[3] *See* Memorandum of Exxon Corporation Regarding Supersedeas Bond [D.E. # 1430], filed on June 21, 2001; Memorandum of Exxon Corporation Regarding Entitlement to Set Off [D.E. # 1431], filed on June 21, 2001; Plaintiffs' Supplemental Memorandum Regarding Judicial Authority For Entry of Judgment in the Full Amount Awarded By the Jury [D.E. # 1432], filed on June 21, 2001; Plaintiffs' Supplemental

In brief, the Plaintiffs contend that, based on the jury's verdict, they are entitled to entry of a final judgment for the total amount of the compensatory damages suffered by the class as a whole, plus pre-judgment interest calculated in accordance with the laws of the 35 political jurisdictions in which the Dealers purchased motor fuel from Exxon during the class period (March 1, 1983, through August 31, 1994) ("Class Period"). According to Plaintiffs, the final judgment would reserve jurisdiction to establish and implement a claims administration procedure by which class members would claim their share of the purported common fund. Plaintiffs contend that Exxon would have no role or standing to participate in the claims administration process or to seek recovery of any unclaimed portion of the purported common fund created by the final judgment.

Exxon, on the other hand, views the form the final judgment would take and its participation in the claims process

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Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1435], filed on June 21, 2001; Plaintiffs' Response to Memorandum of Exxon Corporation Regarding Entitlement to Setoff [D.E. # 1441], filed on July 5, 2001; Plaintiffs' Response to Exxon's Memorandum Regarding Supersedeas Bond [D.E. # 1442], filed on July 6, 2001; Surreply of Exxon Corporation to Plaintiffs' Submission Regarding Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1443], filed on July 6, 2001; Response of Exxon Corporation in Opposition to Plaintiffs' Supplemental Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1444]; Defendant's Memorandum in Response to Plaintiffs' Supplemental Memorandum Regarding Entry of Judgment [D.E. # 1445], filed on July 6, 2001; Reply Memorandum of Exxon Corporation Regarding Entitlement to Set Off [D.E. # 1449], filed on July 13, 2001; Reply Memorandum of Exxon Corporation Regarding Supersedeas Bond [D.E. # 1450], filed on July 13, 2001; Plaintiffs' Reply in Support of Supplemental Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1451], filed on July 13, 2001; and Plaintiffs' Reply in Support of Supplemental Memorandum Regarding Judicial Authority for Entry of Judgment in the Full Amount Awarded by the Jury [D.E. # 1452], filed on July 13, 2001.

quite differently. First, Exxon claims that the Plaintiffs' proposed procedure would constitute a judicial taking of Exxon's property in violation of basic due process rights because it would necessarily result in a final judgment for more than the actual compensatory damages due to class members who may pursue their individual breach of contract claims. According to Exxon, Plaintiffs' proposal would accomplish this by reversing the process for entering a final judgment so that an aggregate amount of class-wide damages would be immediately entered before the total amount of actual compensatory damages claimed by individual class members on their separate breach of contract claims is determined. Exxon raises again its argument, based on recent case law, that the Court cannot enter an award of class-wide damages because it lacks subject matter jurisdiction over the claims of many class members.

Second, Exxon disputes Plaintiffs' contention that, after an aggregate damage award is entered, Exxon would not be entitled to recover any portion of the proposed award that is not claimed as actual compensatory damages by individual class members. Exxon also disagrees with the suggestion that it would not be permitted to participate in the claims administration process. According to Exxon, to require it to pay additional sums or to prevent it from recovering any sums that remain after a claims process is completed serves no compensatory purpose and, therefore, constitutes punitive relief that is expressly prohibited by the Uniform Commercial Code. For the same reason, Exxon claims it is entitled to participate in the claims administration process to ensure that, through duplicate claims or otherwise, no class member receives more than the compensatory damages to which he or she is entitled. In addition, Exxon claims that it is entitled to assert rights of set-off against class members who file claims.

Third, Exxon claims that Plaintiffs' proposed procedure does not address the issues involved in attempting to award prejudgment interest under the laws of different states on the

basis of the Special Verdict rendered in Plaintiffs' favor. According to Exxon, there is no basis in the jury's verdict (or the trial record) for determining the amount of damages suffered by dealers in any particular state against which to apply the state's rate of prejudgment interest.

By this Order, the Court has endeavored to decide all issues posed by the parties and also to approve the form of the judgment to be entered on the Special Verdict in accordance with Fed.R.Civ.P. 58. Although not a final judgment, the Court shall utilize the procedures in 28 U.S.C. § 1292(b) to authorize an interlocutory appeal. For this reason, the Court has ordered Exxon to file its Rule 50 and 59 motions so that, if denied, those rulings could be considered as part of the § 1292(b) review. Each substantive issue is addressed below.

II. *WHETHER THE PLAINTIFFS ARE ENTITLED TO AN AGGREGATE JUDGMENT IN FAVOR OF THE CLASS AS A WHOLE?*

1. Plaintiffs' Further Contentions.

As stated above, Plaintiffs claim that they are entitled to entry of a final judgment for the total amount of the compensatory damages suffered by the class a whole, plus pre-judgment interest for the class as a whole calculated in accordance with the laws of the 35 political jurisdictions in which the Dealers purchased motor fuel from Exxon during the Class Period. Plaintiffs further claim that compensatory damages may be "ministerially computed" by the court by simply multiplying the jury's annual cents per gallon damage awards times the annual gallons of motor fuel purchased by the Class Dealers as reported in the electronic database of motor fuel volumes produced by Exxon, which Plaintiffs have accepted as correct. Plaintiffs next assert that the same annual cents per gallon damage figures also provide the means to accurately calculate pre-judgment interest by state, by year, in accordance with the laws of the 35 political

jurisdictions. Finally, because Exxon's Dealer Volume Database reports Class Dealer motor fuel purchases on a store level basis, the Plaintiffs contend that the jury's cents per gallon damage award also provides a precise means of allocating damages among individual class members in the claims administration process.

2. Analysis.

In analyzing Plaintiffs' contentions, it is first necessary to determine what the jury did, then whether, and under what authority, the Court may enter an aggregate judgment for both compensatory damages and prejudgment interest, and, finally, to consider the propriety of entering such a proposed final judgment given the facts and circumstances of the case.

a. What Did the Jury Decide by its Special Verdict?

In *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335, 1342 (S.D.Fla.1999), this Court stated that, "the ultimate question for the jury is whether Exxon initially gave, and then 'took back' the [DFC] adjustment in total as of March 1, 1983 through August, 1994?" By its Special Verdict, the jury determined that Exxon was liable to the Class Dealers for the "take back," and that it had failed to reduce the wholesale price of motor fuel for the Class Period. The jury then determined the time period by year in which the failure to reduce the wholesale price occurred and the amount, in cents per gallon, by which Exxon failed to provide the reduction [*See* D.E. # 1395].

As is self-evident from the Special Verdict, the jury did not award aggregate compensatory damages in favor of the Plaintiffs. To do so and derive a true aggregate award, the jury would have had to further reduce the total number of gallons of motor fuel sold during the Class Period to account for "opt outs," as well as to make further reductions based upon Exxon's valid affirmative defenses, including statute of

limitations in Ohio. Obviously, the Plaintiffs recognize the necessity for such reductions because, in their proposed procedure, Plaintiffs request the Court to do what the jury did not do; that is, to "ministerially" undertake such an analysis and render an aggregate damage award for the class in the form of a final judgment.

If the jury did not render an aggregate compensatory damage award, what did the jury do by its Special Verdict? Besides finding for Plaintiffs on issues of liability and causation, the jury, in accordance with Fed.R.Civ.P. 49(a), determined class damages in the form of a common guideline or factor [cents per gallon on a year to year basis during the Class Period]. Otherwise stated, the jury did not itself award aggregate class damages or a "fluid verdict"[4]; rather, the jury decided the applicable factor or guideline that will apply to determine the measure of damages of each Class Dealer during the claims administration process without resort to an aggregate fund.

b. Given the Jury's Special Verdict, Under What Authority May the Court Now Ministerially Enter An Aggregate Final Judgment for Compensatory Damages and Prejudgment Interest?

Plaintiffs' briefs did not initially address this question. At oral argument, and in subsequent briefs, Plaintiffs' counsel argued that such authority is provided by virtue of the parties' own stipulation and by Fed.R.Civ.P. 23, 49, and 58. Exxon vigorous denies any such stipulation, or that any rule of civil procedure authorizes the Court to act as Plaintiffs' request.

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[4] A fluid verdict occurs when damages are calculated in the aggregate and individual claims are satisfied out of an aggregate fund. *See Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 114 (E.D.Va.1980) (stating that fluid recovery may occur when damages are calculated in aggregate and individual claims are satisfied out of aggregate fund).

i. Stipulation between the parties

Plaintiff argues that, while Exxon did not stipulate to a class-wide damage calculation, it did stipulate to the facts upon which a class-wide damage calculation can be administratively accomplished by the Court post-trial. [D.E. # 1432, p. 7]. In support, Plaintiff relies on the transcript of the first trial [Transcript, Trial I at 3024:13-3028:16], as well as a written stipulation between the parties concerning the submission of damages to the jury on a cents-per-gallon basis using the volumes of both gasoline and diesel fuel [Exhibit "A" to D.E. # 1432].

However, the 'stipulation' agreement submitted by Plaintiff as Exhibit A to its Supplemental Memorandum Regarding Judicial Authority for Entry of Judgment in the Full Amount Awarded by the Jury [D.E. # 1432] is not signed by both parties and constitutes merely an offer by Exxon, which Plaintiffs apparently rejected, to stipulate to a procedure for recalculating Plaintiffs' proposed measure of damages in the event the Court permitted them to assert claims for sales of diesel fuel, subject to a number of contingencies, such as exhaustion of appeals. The offer expressly states that it was, "not intended as, nor shall it constitute, a waiver of any objection by Exxon to plaintiffs' proposed calculation of damages, including, but not limited to, whether damages should be calculated on a cents-per-gallon basis . . ." *See* Exhibit "A" to D.E. # 1432 at ¶ 3. The proposed stipulation also specifies that Plaintiffs' recalculated cents-per-gallon damages number was to be used for the sole purpose of allocating damages among class members who submit appropriate claims. *Id.* at ¶ 2(c). In sum, the document presented by Plaintiffs is not a binding stipulation between the parties to the facts upon which a class-wide damage calculation can be administratively accomplished by the Court post-trial, and by its very terms it would not provide authority for the Court to enter an aggregate final judgment.

Accordingly, I find that there was no stipulation between the parties that would provide authority for the Court to ministerially enter an aggregate final judgment for compensatory damages and prejudgment interest.[5]

ii. Federal Rules of Civil Procedure

Plaintiffs argue that Rule 58[6] and Rule 23[7], read together, require the Court to enter final judgment on the Special Verdict, and that Rule 49[8] specifically contemplates that the

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[5] A review of the trial transcript identified by the Plaintiffs also provides no authority for their contentions. The parties have vigorously disputed every aspect of this case, and the appropriate means of calculating damages is no exception.

[6] Rule 58 of the Federal Rules of Civil Procedure provides, in pertinent part:

> [U]pon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

[7] Plaintiffs rely on Rule 23(c)(2), which requires notice to all members of a(b)(3) class action that, among other things, "the judgment, whether favorable or not, will include all members who do not request an extension." Fed.R.Civ.P. 23(c)(2). Furthermore, Rule 23(c)(3) provides that, "[t]he judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." Fed.R.Civ.P. 23(c)(3)

[8] Plaintiffs rely expressly on Rule 49(a), which states:

> *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its

Court will use the jury's findings to enter aggregate damages in a final judgment. Exxon argues in response that the Federal Rules of Civil Procedure do not compel the Court to enter an aggregate award of damages equal to the total damages suffered by the class. The Court concurs with Exxon that the Rules do not establish an independent legal basis for this Court to ministerially aggregate compensatory damages in a final judgment when the jury made no such findings in its Special Verdict, and where the adjustments required by the Court are beyond what are "self-evident" mathematical calculations based on the jury's Special Verdict. Beyond that, the obstacles to awarding prejudgment interest on a class basis preclude an aggregate final judgment even if one could be rendered within the Court's discretion for compensatory damages.

Rule 58 and Rule 23 state that the Court shall promptly approve the form of the judgment after entry of the Special Verdict and that, in a 23(b)(3) class action, the judgment shall describe those to whom notice was provided and have not requested exclusion, and whom the court finds to be members of the class. Nothing in either Rule contemplates or accounts for adjustments being made to a final damage award, as is required in this case. These adjustments include determining the following: (a) the damages attributable to sales to dealers who elected to "opt-out" of the class; (b) the damages attributable to sales to dealers whose claims are barred by the applicable statutes of limitations; and (c) the damages attributable to sales covered by releases.

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findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Furthermore, Rule 49(a) also fails to set forth the authority for Plaintiffs' requested relief. While the Court concurs with the Plaintiffs that, in certain limited circumstances, a ministerial aggregating process may be performed by the court, this case is distinguishable from the cases that have utilized such an approach. For example, in *John R. Lewis Inc. v. Newman*, 446 F.2d 800 (5th Cir.1971), the jury returned a special verdict pursuant to Rule 49 and found that the defendant was liable for the value of certain stocks sold to the plaintiff, and that each share of stock had a fair market value of $10.47½. The trial judge then rendered judgment by multiplying this figure by 10,000, or the number of shares sold to each of the two plaintiffs. Unlike this case, the number of plaintiffs in *John R. Lewis* was limited to two, the measure of damages of each share of stock was the same, and the total number of stocks was expressly found by the jury. The case at bar requires calculation of damages for a class of potentially over ten-thousand plaintiffs, the exact number of which is subject to several as yet to be completed adjustments.

Plaintiffs also rely on *McBrayer v. Teckla, Inc.*, 496 F.2d 122 (5th Cir.1974). In *McBrayer*, the jury found in a special verdict that the plaintiff, a single individual, would have sold 46,000 units of his product if not for the defendant's wrongful conduct, and the trial judge entered judgment in the amount of $46,000 by multiplying the number of units by the value of the product ($1/unit). The appellate court reversed, finding that the jury lacked a valid basis for concluding that 46,000 units would have been sold during the contract term. *McBrayer*, 496 F.2d at 127-28. The appellate court did not specifically address the propriety of the district court's act of multiplying the number of units found by the jury by the price per unit. As such, *McBrayer* is of little, if any, precedential value. Furthermore, *McBrayer* clearly did not involve the application of the number of adjustments of the magnitude required in this case in order to reach a final damage judgment.

In sum, there is nothing in the Federal Rules of Civil Procedure that requires the Court to enter a final judgment containing an aggregate damage award at this stage of the proceedings. Even if such authority is implied in limited, self-evident circumstances, its application, as a matter of discretion, is inappropriate here. Unlike the simplified example provided by Plaintiffs of a case in which the jury special verdict says, "We find that the parties had a contract for the sale of 100 widgets. We find that the defendant failed to deliver the widgets. We find that the widgets were worth $4 each," and the Court then performs the ministerial function of multiplying the two amounts and entering a final judgment for the plaintiff of $400 [*see* D.E. # 1432, p. 11-12], the Special Verdict in this case does not lend itself to such treatment. There was never any discussion, agreement, or consideration by the parties or the Court that such a procedure would be followed, because it was always known that there would be significant unclaimed amounts. No discussion occurred at any time to create a *cy pres* fund. The Special Verdict form was limited to finding a common damage factor to measure individual compensatory damages, and, given the lack of any agreement to the contrary and the unique nature of the class and the required adjustments to the total damage amount, it would be inappropriate for the Court to go beyond the Special Verdict form to enter an aggregate compensatory and prejudgment interest award to the class.

c. Does the Case Law Provide Authority for the Court to Ministerially Calculate Aggregate Damages and Enter Final Judgment Therefor?

Plaintiffs argue, in their "Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment" [D.E. # 1424], that, "Consistent with the provisions of the Rule [Fed.R.Civ.P. 23(c)(3)], the federal trial and appellate courts have regularly entered or approved of lump sum judgments

for the aggregate amount of compensatory damages suffered by all class members in common fund, contract-based class actions brought under Rule 23(b)(3)." In support, Plaintiffs cite to *Boeing Co. v. Van Gemert*, 444 U.S. 472, 475-77, 100 S.Ct. 745, 748, 62 L.Ed.2d 676 (1980); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 408-09 (11th Cir. 1986); *Fogie v. THORN Am., Inc.*, 190 F.3d 889, 904-05 (8th Cir.1999); and *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir.1990).

During oral argument, however, Plaintiffs conceded that none of these cases directly hold that a district court may ministerially calculate aggregate damages in the absence of a jury verdict to that effect. Upon independent review, the Court reaches this conclusion as well.

In *Boeing*, for instance, the Supreme Court did not expressly decide the propriety of an aggregate judgment in a class action context, because the issue was never raised on appeal.[9] Rather, the precise question presented in the class action case was whether a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by judgment. *Boeing*, 444 U.S. at 473, 100 S.Ct. at 747. There, the district judge entered a judgment which awarded a determinate fund for the benefit of every member of the class

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[9] In *Boeing*, the district court awarded as damages the difference between the redemption price of the outstanding debentures and the price at which two shares of Boeing's common stock traded on the last day for exercising conversion rights. *See Boeing*, 444 U.S. at 474-75, 100 S.Ct. at 747. By its judgement, the district court ordered Boeing to deposit the principal sum of $3,289,359 into an escrow account, which was then administered by a Special Master. *Id.* at 476 n. 3, 100 S.Ct. at 748 n. 3. Thus, it appears that, unlike this case, the district judge awarded aggregate lump sum damages to the class. Class members who had filed individual claims also contended that they were entitled to receive pro rata shares of any unclaimed damages, or that they should receive enough of the unclaimed money to pay their legal expenses. *Id.* at 475, 100 S.Ct. at 747.

whom the plaintiffs represented. Boeing did not appeal the judgment awarding the class a sum certain. *Id.* at 479, 100 S.Ct. at 750. Although Boeing argued before the Supreme Court that the judgment fund conferred no benefit on class members who failed to claim against it, the Supreme Court determined that, "[n]othing in the [district] court's order made Boeing's liability contingent upon the presentation of individual claims." *Id.* at 481 n. 5, 100 S.Ct. at 750 n. 5. The Court further stated that, "[s]ince there was no appeal from the judgment that quantified Boeing's liability, Boeing presently has no interest in any part of the fund." *Id.* at 481, 100 S.Ct. at 751. Consequently, the Supreme Court assumed the propriety of the district judge's final judgment since it never was appealed. Moreover, there is no indication in *Boeing* that the district judge reached an aggregate class damage by following a procedure comparable to that proposed by Plaintiffs in this case.

In *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405 (11th Cir.1986), tenants in a public housing complex brought suit for injunctive relief and monetary damages in a class action involving utility allowances to tenants in a public housing complex. The district court found that the defendant, Greater Gadsden, breached a contractual duty to comply with applicable HUD regulations. Evidentially, the district court determined the amount of compensatory damages on summary judgment. In that regard, the Eleventh Circuit stated: "The district court's calculations were based on data agreed to by all parties, abut [sic] which there was no genuine issue of fact." *Nelson*, 802 F.2d at 409. Under the district judge's order, any compensatory damages which were not claimed within a specified period of time were to be used by Greater Gadsden to increase the energy efficiency of the apartment units or to improve the defendant-supplied appliances within the units. *Id.* at 409. The Eleventh Circuit did not reject the district court's approach as an improper "fluid recovery," partially because the plaintiffs had proven individual damages

based on individual usages. Accordingly, nothing in *Nelson* supports a ministerial calculation of aggregate damages where the judge is not the trier of fact.

d. Is this a "Common Fund" Case Upon Which a Aggregate Final Judgment Can Be Entered?

The answer is "no." The issue of "common fund" never arose in this case until after the jury's Special Verdict. By *sua sponte* order [D.E. # 1422], the Court requested the parties to address the "common fund" issue at oral argument for purpose of further analyzing subject matter jurisdiction. There, Plaintiffs addressed "common fund" in a different context as well. Plaintiffs contended that the Court may enter an aggregate final judgment because the jury established a "common fund" by its Special Verdict. Exxon denies that this is a common fund case. The Court concurs with Exxon that the jury's Special Verdict did not establish a common fund, but only a "common damage factor" to measure individual compensatory damages. Although Exxon does not concede this, the jury also found a good faith duty "common to all class members" to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period.

The essential facts of the case were set forth in *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D.Fla. 1999) (denying Exxon's renewed motion for summary judgment). For the most part, Plaintiffs established the same facts at trial. Plaintiffs established that every Sales Agreement in effect or entered into by Exxon and the Class Dealers during the Class Period contained an open price term, imposing a concurrent express duty to carry out the provisions of each Sales Agreement in good faith; that is, because of the nature of Exxon's obligation, each class member's individual sales agreement gave rise to a "collective" contractual duty to the "dealer class as a whole" to reduce wholesale prices to offset

the 3% fee imposed by Exxon to offset the cost of credit. The jury determined that Exxon breached its obligation to its Class Dealers [D.E. # 1395, p. 5].

While Plaintiffs convincingly argue that they have sought to enforce a right that is common to the class, and that such right is an indicia of a "common fund," what is missing to create a "common fund" is the *res* itself, such as a piece of land, an insurance policy, a lien, or an item of collateral, which the plaintiffs might claim as common owners or in which they might share a common undivided interest arising under a single title or right.[10] *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1263 (11th Cir.2000) ("Plaintiffs in paradigm 'common fund' cases assert claims to a piece of land, a trust fund, an estate, an insurance policy, a lien, or an item of collateral, which they claim as common owners or in which they share a common interest arising under a single title or right.") (*quoting Gilman v. BHC Secs. Inc.*, 104 F.3d 1418, 1424 (2d Cir.1997)). Here, there is no such *res*. Instead, the Class Dealers are asserting rights arising from their individual Sales Agreements, and, because they were successful, they will recover the amount of excessive motor fuel charges each paid under his or her own sales agreement. The fact that this recovery may be obtained based on a common damage factor and shared duty does not convert separate and distinct claims for damages into a fund in which the class members have a common and undivided interest. *See Morrison*, 228 F.3d at 1264 ("The members of the Policyholder Class are asserting rights arising from their individual insurance policies, and if successful, they will recover the amount of excessive premiums each paid under

[10] While there is a unitary decision on a common damage factor, there is no fixed asset or piece of property in which all class members have a pre-existing interest, or where apportionment or determination of one class member's interest cannot be made without affecting the proportionate interests of other similarly situated class members.

his own policy. The fact that this recovery may be obtained under an equitable theory of unjust enrichment does not convert separate and distinct claims for damages into a fund in which the class members have a common and undivided interest.").

In sum, Plaintiffs may not equate a class member's interest in the total damage award sought by the class with the "joint and undivided" interest in a single claim or "res," as required by *Morrison*, and thereby justify the entry of an aggregate judgment. As the Second Circuit stated in *Gilman*, 104 F.3d 1418, 1424 (2d Cir.1997) (cited at length in *Morrison*), "Gilman and his putative class have no joint interest other than a shared appetite for a money judgment payable by a single defendant—which is not the type of 'common and undivided interest' that warrants an exception to the rule against aggregating claims." *See also Gilman*, 104 F.3d at 1426 ("Such a 'fund' [damages from disgorgement of payments improperly retained] is created to facilitate the litigation process in virtually every class action and has nothing necessarily to do with whether the plaintiffs shared a pre-existing (pre-litigation) interest in the subject of the litigation . . . what controls is the nature of the right asserted, not whether vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs.").

e. Can the Court Enter a "Final Judgment" Based on the Jury's Special Verdict in this Case?

The answer is "no." Pursuant to Fed.R.Civ.P. 49, the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. Subsequent to the jury's rendering of a special verdict, the court, pursuant to Fed.R.Civ.P. 58, is to approve the form of judgment, and the Clerk of Court is to enter it. Under these rules, a court may only enter a judgment consistent with the jury's verdict. When multiple parties are involved, "any

order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed.R.Civ.P. 54(b).

Where, as here, the verdict does not determine an aggregate compensatory award to the class as a whole, it is not "final" as contemplated in Fed.R.Civ.P. 54, 58, or 23, although, under Rule 58 and 23(c)(3), a judgment entered is conclusive as to the factual matters decided. No final judgment can be entered until after individual class members have made claims and both the validity and the amount of the claims have been determined; that is, to be "final," the judgment must adjudicate all aspects of the claim, including compensatory damages and prejudgment interest for each class member. *See generally Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 96 S.Ct. 1202, 1205-06, 47 L.Ed.2d 435 (1976) (no final, appealable judgment where "respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for . . . . [T]hey requested damages, but were not awarded any . . . ."); *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir.2000) (noting that "where assessment of damages or awarding of other relief remains to be resolved [judgments] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291") (*quoting In re Morrell*, 880 F.2d 855, 856 (5th Cir.1989)).

f. What is The Propriety of Entering A Total Damage Aggregate Award in This Case?

The aggregate judgment issue did not arise during deliberation on jury instructions in either the first or second trial. If it had arisen, it would have been the subject of significant briefing and debate, since this is not a case where there is a

statutory authorization for an aggregate award. *Compare Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (permitting aggregate proof of damages where the plaintiff class sought statutory not actual damages under the FLCRA and, as such, was not obligated to prove actual injury for each class member). Properly so, the jury in this case determined by their Special Verdict only a class wide measure of damages which then can be assessed mechanically to determine individualized claims.

Beside the issues of legality of entering an aggregate award of compensatory damages when the jury has not done so, the Court must further consider the "propriety" of an aggregate compensatory and prejudgment interest award under the circumstances of the case, including the potential sizeable *cy pres* fund due to the prospect of substantial unclaimed funds.[11]

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[11] When an aggregate class recovery is not fully allocated to class members, the unclaimed portion may be distributed for the indirect or partial benefit of the class under *cy pres* principles, including fluid recovery doctrines. *Newberg on Class Actions*, § 10.16. As recognized by *Newberg*, *cy pres* distributions remain controversial from the defendant's perspective. *Id.*

Plaintiffs argue that any unclaimed monies rightfully belong to injured class members and that to deny a *cy pres* approach is to give a windfall to a wrongdoer. At first blush, Plaintiffs' argument seems persuasive, but it is not supported by convincing precedent in class actions of this nature. All litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for wrongs he, she or it has committed. However, the court only is to do so by applying settled or clearly stated principles of law, rather than by some process of divination. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1013 (2nd Cir.1973), *vacated on other grounds by Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

Plaintiffs' proposal envisions a significant unclaimed fund[12] which, under any and all circumstances, it argues should not be returned to Exxon. As Plaintiffs' state: "Reverter is not an option in this case because Exxon does not have a legitimate claim to the money. If all rightful owners do not appear to claim their share, the money should not go back to Exxon, which wrongfully separated the true owners from their money in the first place." Plaintiffs' Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1424], at p. 22.

Where the goals of the underlying statute(s) upon which the class claims are based are strictly compensatory, at least one circuit has recognized that a class action resulting in substantial unclaimed funds will not further that goal. *See Six (6) Mexican Workers*, 904 F.2d at 1306 ("Where the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal."). Nor is such a fund appropriate to relieve the plaintiff class of the burden of proving individual damages. *See Nelson*, 802 F.2d at 409. But, where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the "superior" and only viable means to achieve these purposes, despite the prospect of unclaimed funds. *See Six (6) Mexican Workers*, 904 F.2d at 1306. Otherwise stated, the *cy pres* distribution of unclaimed funds is disfavored where it subjects defendants to greater liability or alters their substantive rights, unless there is a statutory purpose of deterrence or disgorgement. *See, e.g., In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.1974) (rejecting an attempt to use fluid recovery or *cy pres* distribution to avoid

[12] While the Court cannot anticipate the exact magnitude of an unclaimed fund, Exxon estimates that it would represent approximately $125 million, which Plaintiffs do not contest.

the difficulty of proving each class members' specific injury because to do so would alter the defendants' substantive rights).

The Court concurs with Exxon that Plaintiffs' damages for breach of contract claims are limited, under the Uniform Commercial Code[13], to only compensatory damages, not consequential, special or punitive relief. By prior order, the Court denied Plaintiffs' claim for punitive damages. *See Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D.Fla.1999).

U.C.C. § 1-106(1) specifically provides that remedies for breach of contract are designed so that, "the aggrieved party [the individual dealer] may be put in as good a position as if the other party [Exxon] had performed." This provision also states unequivocally that, "neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." *Id.* As the U.C.C.'s Official Commentary notes, this provision was intended "to make it clear that compensatory damages are limited to compensation," and that "[t]hey do not include consequential or special damages, or penal damages." U.C.C. § 1-106, Official Comment 1.

Thus, under U.C.C. principles, once all class members who assert valid claims are made whole, the compensatory purpose of any damage award has been completely satisfied. To the extent that any aggregate award exceeds the total amount of such damages, it no longer serves the compensatory purpose of damages relief under U.C.C. § 1-106 and becomes punitive in nature. Such an award would thereby violate Exxon's substantive rights under the Uniform Com-

[13] The Court has found, and the parties have agreed, that the law applicable to this cause is the Uniform Commercial Code, which has been uniformly adopted in all applicable jurisdictions, with the exception of Louisiana.

mercial Code and would be contrary to the Rules Enabling Act, which specifically provides that procedures under the Federal Rules of Civil Procedure, including Rule 23(b)(3), "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). *See In Re: Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.1974) ("We agree with the decision reached in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights . . . . Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure."). *See also Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2nd Cir.1983) (reaffirming the Second Circuit's rejection of "fluid" class recovery in antitrust class actions). *But see Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (affirming award of "in gross" judgment in class action under Farm Labor Contractor Registration Act, distinguishing *Eisen* and *In re Hotel* on the basis that statutory, per-violation damages under Act—unlike antitrust or security damages—did not require individual proof of actual damages).

In addition to the problem of whether an in-gross award bypasses the need for individual proof of damage, there are serious questions as to whether an aggregate award of damages will significantly overstate the entitlement of the Class Dealers to those damages. The likelihood of potentially significant "unclaimed damages" from an aggregate or lump award, and the consequent punitive effect, is compounded in this case because of the very real possibility that the Court may lack subject matter jurisdiction over the claims of a number of putative class members.[14]

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[14] Notwithstanding the Circuit split, the Court stands by its "Order on Plaintiffs' Motion for Partial Summary Judgment Regarding Subject Matter Jurisdiction" [D.E. # 1122]. The Court's reasons are stated in *Leszczynski v. Allianz Ins. Co.*, 176 F.R.D. 659 (S.D.Fla.1997). A far better statement of the same reasons appears in *Poore v. American-Amicable Life Ins. Co. of Texas*, 125 F.Supp.2d 1378, 1382-1384 (S.D.Ga.2000), which I incorporate by reference.

Here, the Magistrate Judge, while recognizing that some plaintiffs exceed the minimum jurisdictional amount in this case, concluded that *Zahn* applies such that each plaintiff in a class action rounded on diversity must exceed the minimum jurisdictional requirements, but denied Exxon's motion to dismiss for lack of subject matter jurisdiction on other grounds. *See* D.E. # 338, p. 3. Judge Kehoe denied Exxon's objections without opinion. *See* D.E. # 362. Exxon has never disputed that some of the named plaintiffs and putative class members individually exceed the minimum jurisdictional requirements.

Here, each Dealer's breach of contract claim is based on diversity jurisdiction under 28 U.S.C. § 1332. Although the Court has previously ruled that it has supplemental jurisdiction under 28 U.S.C. § 1332, *see* July 1, 1999 "Order on Plaintiffs' Motion for Partial Summary Judgment Regarding Subject Matter Jurisdiction" [D.E. # 1122], the resolution of this issue in the Eleventh Circuit remains far from clear. In the event subject matter jurisdiction is lacking, the Court cannot include in an aggregate damage award those claims of class members over which it has no jurisdiction. To do so would expose Exxon to potential double liability in the event it is successfully sued in state court by a class member who is dismissed for lack of subject matter jurisdiction. Moreover, in the event of remand, untangling those class members who are included in a gross award, but who do not meet threshold jurisdictional amounts, will necessitate a second inquiry into the value of each dealer's claim if Plaintiffs' proposal is followed. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938) ("The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the

courts. . . . [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."). Under Exxon's proposal, both inquires can be conducted simultaneously during the claims process.

Most recently, the Court of Appeals for the Eighth Circuit has ruled that 28 U.S.C. § 1367 does not overrule the Supreme Court's holding in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), and that every member of a class asserting state law claims must satisfy the minimum jurisdictional amount of the diversity statute. *See Trimble v. Asarco, Inc.*, 232 F.3d 946, 961 (8th Cir.2000). As a result of this decision, the Eighth Circuit now joins the Court of Appeals for both the Third and Tenth Circuits to form a majority of federal courts that have held that *Zahn* continues to govern subject matter jurisdiction of federal district courts in class action claims. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3rd Cir.1999) and *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir.1998). While the Eleventh Circuit has recognized this split of authority, and the equal division of eight members of the United States Supreme Court on the issue, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 n. 5 (11th Cir. 2000), it has not yet had occasion to announce its position on the issue.

In formulating a post-judgment procedure, this Court cannot discount the possibility that the Eleventh Circuit may align itself with the majority of the other Circuits by concluding that the 1990 amendments to 28 U.S.C. § 1367(a) did not overrule *Zahn* and extend supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy.

Under such circumstances, Exxon's argument that a lump sum award is inherently punitive, rather than compensatory, is enhanced, particularly when considered in light of Plaintiffs' further request to preclude Exxon from recovering any unclaimed funds remaining after the payment of all valid claims.

To summarize, the Court denies Plaintiffs' request that a final judgment be entered for the aggregate sum of the total damages, as adjusted. Rather, the Court shall direct the Clerk of Court to enter judgment in the manner set forth in Attachment A to this Order. In addition, the Court, by this Order, shall rule on all remaining outstanding issues affecting the claims administration process and request the Eleventh Circuit to review these matters before such an administration process is implemented.

III. *ISSUES AFFECTING THE CLAIMS ADMINISTRATION PROCESS*

The Court must establish and conduct a claims process whereby the named plaintiffs and putative class members can present their claims. Within that process there are certain discrete issues which will affect the extent of the claims that certain individual class members can make or recover and the manner by which such claims are calculated. These include:

1. Calculation of Individual Class Member Compensatory Damages.

The calculation of an award of compensatory damages to individual Class Dealers is straight-forward.[15] Compensatory damages to each dealer are mathematically derived from multiplying the cents per gallon damage award determined by

[15] For a more detailed discussion of the appropriateness of the compensatory award, see the discussion *infra*, at section III(4), pertaining to the award of prejudgment interest.

the jury in the Special Verdict times the total number of gallons of motor fuel purchased by that dealer over the period of March 1, 1983, until August 29, 1994, as established by Exxon's Dealer Volume Database on a store level basis, less reductions, if any, required based on statute of limitations in Ohio, and Category-four releases in Delaware.[16] Thus, the award of compensatory damages to an individual class member will involve: (i) identifying the station or stations at which the class member was a dealer; (ii) determining the time period during which the class member was a dealer at that station, and (iii) multiplying the gallons of motor fuel sold to that station during that period by the measure of damages applicable during that time period.

2. *Inclusion or Exclusion of Diesel Fuel Purchases In the Calculation of Compensatory Damages.*

The Court had previously reserved to consider Exxon's motion to exclude diesel fuel purchases from the computation of total motor fuel volumes. The issue that requires resolution is whether gallons of diesel fuel Exxon sold to the Dealers during Discount for Cash, as opposed to gallons of gasoline, are properly included within the class claims. The Court now concludes that diesel fuel purchases are to be included in the calculation of class members' compensatory damages.

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[16] See discussion in *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 684 n. 26 (S.D.Fla.1999). In its "Response of Exxon Corporation in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment," Exxon contends that the Court made no ruling with regard to general releases that were entered during the period between "disclosure" and class certification. *See* D.E. 1416 at p. 22. The Court respectfully disagrees. These releases fall within the category of "pre-certification Releases," and, in light of the Special Verdict findings, may not be enforced.

Exxon contends that Plaintiffs should not be permitted to amend their claims to include diesel fuel because it was not adequately pled in the Plaintiffs' amended complaint. Under Fed.R.Civ.P. 15(b), a court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved and where the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party's defense upon the merits. *See Menendez v. Perishable Distribs., Inc.*, 763 F.2d 1374, 1379 n. 3 (11th Cir.1985); *Harris v. Garner*, 216 F.3d 970, 996 (11th Cir.2000) ("[U]nder Rule 15(b), courts should allow amendments to conform the pleadings to the evidence both during trial, and even after judgment, as long as the opposing party cannot prove that he is thereby prejudiced."). Both elements are met in this case.

The record unequivocally establishes that Plaintiffs' claims have consistently encompassed Exxon's pricing of both gasoline and diesel fuel. Exxon's Discount For Cash program applied to both gasoline and diesel fuel (collectively referred to by Exxon as "motor fuel"). At the close of the Plaintiffs' case during the first trial, the parties stipulated that the Plaintiffs were not required to offer separate proof of the manner in which Exxon priced diesel fuel, that a finding by the jury that Exxon breached a duty in pricing gasoline would constitute a finding of breach with respect to the pricing of diesel fuel, and that for purpose of computing and allocating damages on a cents per gallon basis, the combined volumes of gasoline and diesel would be used [Trial I Transcript, 8/20/00, pp. 3024-28].

At the second trial, all prior stipulations remained in effect [D.E. # 1264]. As a result, during the second trial, the Court admitted into evidence, without objection, Plaintiffs' Exhibit Number "1," which is a summary schedule of the Class Dealers' damages, computed on a cents per gallon basis using volumes of both gasoline and diesel fuel. The jury's award of

cents per gallon in the Special Verdict followed directly from the calculations reflected in this exhibit. Exxon has suffered no prejudice. It was well able to defend on the Plaintiffs' claim. Moreover, the merits of the cause would be subserved by not permitting the pleadings to be amended to conform to the evidence. Accordingly, Exxon's objection to the inclusion of diesel fuel is denied.

3. Application of Statutes of Limitation in Ohio and Florida.

The Court previously has found that Ohio and Florida do not recognize the fraudulent concealment doctrine as a legal avoidance to a statute of limitations defense. *See Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 672 (S.D.Fla. 1999). In its initial briefs, Plaintiffs reargued these matters based the application of a fifteen year statute of limitations in Ohio [Ohio Rev.Code Ann. § 2305.06], and a recent Florida Supreme Court decision which Plaintiffs claim has clarified the application of the fraudulent concealment doctrine with respect to that state's statute of limitations and requires a different result than originally determined by the Court. *See Allapattah Servs.*, 188 F.R.D. at 675 n. 16 (concluding under Florida law that a fraudulent concealment claim cannot "toll" the statute of limitations).

a. Ohio.

Since the filing of their initial briefs, Plaintiffs have conceded that the Ohio statute of limitations is applicable. Accordingly, gallons purchased by dealers residing in Ohio prior to May 1987 shall be excluded from the damage computation.

b. Florida.

Florida has a five year statute of limitations for breach of contract claims that does not recognize "tolling" for fraudulent concealment. *See* Fla. Stat. § 95.11(2)(b). Plaintiffs

claim that a recent Florida Supreme Court decision, *Hearndon v. Graham*, 767 So.2d 1179 (Fla.2000), has changed Florida law since the Court's prior opinion, and that its cause of action did not "accrue" until November of 1990 under the "delayed discovery doctrine."

In *Hearndon*, the Florida Supreme Court addressed the following certified question: "Where a plaintiff in a tort action based upon child abuse alleges that she suffered from traumatic amnesia caused by the abuse, does *Fulton County Admin. v. Sullivan*, 22 Fla. L. Weekly S578 (Fla.1997), preclude judicial recognition of an exception to or a tolling of the statute of limitations based upon the doctrine of delayed discovery recognized in Chapter 92-102, Laws of Florida?" In response, the Florida Supreme Court held that the delayed discovery doctrine applies to the "accrual" of the instant cause of action. *Hearndon*, 767 So.2d at 1180. The Court receded from past decisions that applied the delayed discovery doctrine to toll the running of a statute of limitations. *Id.* at 1184. It held that the Florida Statutes do not impede the delay of the accrual of the cause of action. *Id.* The Court also described the delayed discovery doctrine in this manner:

> The "delayed discovery" doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action. *See Hillsborough Community Mental Health Ctr. v. Harr*, 618 So.2d 187, 189 (Fla.1993); 35 Fla. Jur.2d Limitations and Laches § 60 (1996). The United States Supreme Court applied the "blameless ignorance" doctrine in *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), thereby delaying the accrual of a cause of action until the plaintiff reasonably discovered the right of action, reasoning that "the traditional purposes of statutes of limitations . . . require the assertion of claims within a specified period of time after notice of the invasion of

> legal rights." *Id.* This Court adopted the doctrine into Florida law as the "delayed discovery" doctrine. *City of Miami v. Brooks*, 70 So.2d 306, 309 (Fla.1954). *See Kush v. Lloyd*, 616 So.2d 415, 418 (Fla.1992); *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla.1969) (explaining that the "accrual of the [underlying cause of action] must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights"). Thus, application of the delayed discovery doctrine to the accrual of a cause of action and, therefore, to the running of a statute of limitation is not new to Florida law.

Id. at 1183.

Plaintiffs claim that, under Florida's "delayed discovery doctrine," their cause of action did not accrue, and the statute of limitations did not begin to run, until the Plaintiffs knew, or reasonably should have known, of the act giving rise to the cause of action. *See id.* at 1184. Thus, in proving the elements of fraudulent concealment as found by the jury in the Special Verdict form, Plaintiffs claim that they also have established the identical elements which under Florida law would result in the non-accrual of their claim. In response, Exxon argues that *Hearndon* is limited to the particular tort claim involved and is inapplicable to accrual of breach of contract claims.

Plaintiffs arguments are persuasive that Florida law has changed since this Court's prior order addressing the issue. As a federal court sitting in diversity, I must apply the substantive law of the forum state. *Insurance Co. of N. Am. v. Lexow*, 937 F.2d 569, 571 (11th Cir.1991). While Exxon claims that *Hearndon* is narrowly limited, that position has been rejected by the Florida Fourth District Court of Appeals in *Monahan v. Davis*, 781 So.2d 436, 437 (Fla. 4th DCA 2001) ("Appellees argue that the delayed discovery doctrine does not apply to the causes of action here at issue . . . This

narrow view of the delayed discovery doctrine is at odds with . . . *Hearndon* . . . ."). The appellate court stated that "[T]he supreme court's discussion of the delayed discovery doctrine demonstrates that it is rooted in the common law, not created by statute." *Id.* at 438. It further stated: "*Hearndon* held that the delayed discovery doctrine, when properly applied, operates to delay the *accural* of a cause of action." *Id.*

While *Monahan* admittedly did not apply to a contract claim based on common law, its analysis lends support to the argument that the Florida Supreme Court would reach the same conclusion even if contract claims were involved. *See Insurance Co. of N. America*, 937 F.2d at 571 (in applying state law, district court is to adhere to the decisions of the state's intermediate appellate courts absent some persuasive indiction that the state's highest court would decide the issue otherwise). Otherwise stated, Florida's "delayed discovery doctrine" would apply here in that, based on the jury's Special Verdict, the Plaintiffs did not know, nor reasonable should have known, of the breach of contract claim giving rise to the cause of action until November of 1990. [*See* D.E. # 1395, p. 15 (finding that the Dealers did not learn, or had sufficient facts to raise a suspicion and a duty to investigate that they had a claim against Exxon, until November 1990)].

4. Entitlement to Prejudgment Interest.

The Court and the parties have recognized the complexity of the prejudgment interest problem in this case. Prior to trial, the Court addressed the matter of prejudgment interest to the extent practicable in *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667 (S.D.Fla.1999). There, the Court surveyed the law on prejudgment interest in the political jurisdictions in which Exxon dealers conducted business during the Class Period, and concluded: (1) the Plaintiffs'

claims are liquidated[17]; (2) prejudgment interest is awarded as a matter of right in 29 of the 36 jurisdictions [Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland[18], Massachusetts, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington[19], West Virginia, and Wyoming[20]]; (3) in all but three of

[17] The Court concluded that in the jurisdictions in which prejudgment interest is awarded as a matter of right, the damages must be liquidated in nature. Based on the evidence presented at that time, the Court determined that Plaintiffs' breach of contract damages were liquidated, but reserved to issue a final ruling on this matter at the conclusion of trial. *Allapattah Servs.*, 188 F.R.D. at 685 n. 29.

[18] For entitlement to prejudgment interest as a matter of right in Maryland, there must be an obligation to tender a certain sum upon a certain date. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 32 [citation omitted]. Here, the jury found that Exxon failed to reduce the wholesale price of its motor fuel to offset its 3% fee to its Class dealers from March of 1983 through August of 1994 [D.E. # 1395, pp. 10 & 11]. This finding is sufficient to permit prejudgment interest as a matter of right in Maryland, since Exxon failed to reduce prices by a sum certain on dates certain.

[19] In Washington, although entitlement to prejudgment interest on liquidated claims is a matter of right, a trial court, in its discretion, may reduce or disallow such interest upon a finding that the plaintiff unreasonably delayed in prosecuting a claim. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 33 [citation omitted]. Here, the jury found by its Special Verdict that the Class Dealers learned, or their representatives had sufficient facts to raise a suspicion, and a duty to investigate, as of November of 1990 [D.E. # 1395, p. 15]. Based on this finding, there is no basis to reduce or disallow prejudgment interest on the ground that Plaintiffs unreasonably delayed prosecuting their claims.

[20] Applying Wyoming law, Class Dealers in that state would be entitled to prejudgment interest as a matter of right within the Class Period from the earliest date when each Class Dealer purchased motor fuel from Exxon since each such dealer was entitled to a reduction on that date and was deprived of the beneficial use of the money. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 34 (citations omitted).

the above stated jurisdictions [Arizona, Maine, and New Hampshire], interest accrues from the date of the breach[21], and in the remaining three jurisdictions, it runs from the date of filing the complaint [*i.e.*, May 13, 1991]; (4) in seven jurisdictions [Connecticut, Indiana, Mississippi, New Jersey, New Mexico, Tennessee, and Virginia], interest is discretionary, requiring the presentation of evidence in support of entitlement; (5) in those jurisdictions, the court decides whether the Plaintiffs' are entitled to prejudgment interest [in one jurisdiction, Virginia, the issue is for the jury, but Exxon has waived a jury determination on this issue. *See* Trial I Transcript, 8/18/99, at pp. 2615/24-2616/1]; (6) in some of these remaining states the time of accrual of the right to prejudgment interest is specified by statute, and in others it is for the court's determination; and (7) the parties would be required to provide further details as to the applicable prejudgment interest rates of the various states during the years at issue.

In its post-verdict submissions, Exxon has raised further challenges. Exxon contends that the Plaintiffs are not entitled to prejudgment interest as a matter of right in any state because: (1) there is no basis to determine the amount of "damages" subject to each state's prejudgment interest; and (2) the Plaintiffs' damages are not liquidated.[22] Where the Court has discretionary jurisdiction, Exxon further argues that

[21] For discussion of how prejudgment interest would be calculated from the date of breach, see sections III(4)(a) and III(5) of this order, *infra*.

[22] Exxon also argues that the Court should not award prejudgment interest with respect to dealers who do not submit claims or to those class members over which the Court lacks subject matter jurisdiction. For reasons stated above, the Court concurs with Exxon that prejudgment interest may only be awarded to class members who submit claims. Moreover, if, upon further appellate review, it is determined that compensatory damages may not be awarded to class members who do not individually meet requisite diversity monetary requirements, then prejudgment interest cannot be awarded to those class members either.

the periods for any consideration of prejudgment interest should be limited, and, in any event, that the law of the seven discretionary states would not permit a discretionary award. Each issue is addressed separately below.

a. Exxon's claim that prejudgment interest should not be awarded because there is no basis to determine the amount of damages subject to each state's prejudgment interest rate.

Exxon contends that there is no evidence in the trial record (much less a jury finding) that dealers in any particular state were in fact overcharged (or if so, the amount of the overcharge). The Court disagrees. The record contains competent, substantial evidence upon which the jury's determination of a damage factor was based, and upon which the jury could reasonably rely.

When monetary relief is sought, and when data from each class member is required to assess individual recovery entitlement, it is appropriate for the class representatives to develop and prove common guidelines or formulae that will apply to determine the measure of recovery for each individual proof of claim. *Newberg On Class Actions*, § 10.01 (3d ed.1992). As noted in *Newberg:*

> Formulae for individual measurement of damages are most frequently found in securities fraud actions and in antitrust actions for price-fixing violations. Similar guidelines for individual measure of monetary relief are found in employment discrimination and other civil rights class actions. There are occasions when it is feasible and reasonable to prove aggregate monetary relief for the class from an examination of the defendant's records, or by use of a common formula or measurement of damages multiplied by the number of transactions, units, or class members involved, or by reasonable approximation with proper adherence to recognized evidentiary standards.

Id.

The case law supports the calculation of compensatory damages [to which prejudgment interest will apply] through a common mathematical factor in a class context. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978) (if damages are capable of formula calculations, no manageability problem exists even though individual claims may exist); *Brown v. Pro Football, Inc.*, 146 F.R.D. 1, 5 (D.D.C.1992) (finding no manageability problem because the calculation of individual damages may be made by simple common formula); *Walsh v. Pittsburgh Press Co.*, 160 F.R.D. 527, 531 (W.D.Pa.1994) (determination of amount of recovery for each employee class member will be based on a manageable mathematical formula); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-86 (9th Cir.1996) (calculation of damages through random statistical sampling techniques affirmed, although court noted: "While the district court's methodology in determining valid claims is unorthodox, it can be justified by the extraordinarily unusual nature of this case.").

Here, Plaintiffs' proof of aggregate monetary damages [based on a finding of cents per gallon] was feasible and appropriate under the unique and highly unusual circumstances of this case. The proof was sufficiently reliable to permit a just determination of Exxon's liability within recognized standards of admissible and probative evidence in response to what Exxon, itself, represented to the Class Dealers.

To paraphrase the United States Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250-51, 75 L.Ed. 544 (1931) (an antitrust treble-damage action), where the breach itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. *In such case, while the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.*" (emphasis added).

Based on their proof of the aggregate damage factor, as determined by the jury, there is ample basis for the Court to exercise its discretion to award prejudgment interest to individual Class Dealers who file verifiable claims arising in the discretionary states involved. The Court hereby so finds. Exxon had a good faith obligation to its dealers during the Class Period to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period [*See* D.E. # 1395, Special Verdict, p. 3]. Exxon's good faith obligation, by its very terms, was made to each dealer, and the class as a whole, regardless of whether that dealer utilized the discount for cash program. The jury found that Exxon failed to live up to this obligation. *Id.* at p. 5. The proof at trial was that, in March of 1983, in accordance with its secret business plan, Exxon took back in its entirety the offset it had initially provided, and never provided the offset again. Thus, after March of 1983, no

dealer in any market at any time received any Discount For Cash offset whatsoever. This leaves the calculation of damages certain in amount, time[23] and location.[24]

It is now equitable to compensate the class dealers for lost earnings on a sum of money to which they were entitled. *See Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 687 (S.D.Fla.1999) (recognizing that "the equitable purpose of prejudgment interest is to compensate a party for lost earnings on a sum of money to which it was entitled, but which has been retained by another") (citation omitted). The damage against which to apply each state's prejudgment interest rate is to be determined by multiplying the amount of the annual cents per gallon factor, as determined by the jury, by the volume of Exxon's sales to individual dealers in that state who submit verified claims, less any reductions required by virtue of statute of limitations in Ohio and Category-4 Releases in Delaware.

b. Exxon's claim that the Court should not award prejudgment interest because Plaintiffs' damage claims are not liquidated.

Exxon contends that there is no evidence in the trial record to conclude that Plaintiffs' damages are liquidated on an individual or class basis. The Court disagrees. Plaintiffs' damage claim is in fact subject to mathematical computation without reliance on opinion or discretion. It is the total amount of damages suffered by the class as a whole; that is, the total dollars Exxon collected through the 3% fee. Exxon alone controlled the documents which made the calculation ascertainable with mathematical certainty and from which

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[23] Plaintiffs established, and the jury found, damages on an annual cents per gallon basis because this was the shortest period of time that Exxon's business records reported credit cost recovery fee revenue.

[24] Exxon's dealer volume database allows motor fuel volumes to be segregated on a state by state basis.

Exxon itself could have made a proper tender with reasonable certainty. The jury verdict establishing a "cents per gallon" damage factor now makes the application of damages mathematically precise to individual dealers based on volumes purchased. The combination of these factors satisfies the requirements in every jurisdiction with respect to the Plaintiffs' entitlement to prejudgment interest. *See Alfa Mut. Ins. Co. v. Beard*, 597 So.2d 664, 666-67 (Ala.1992) (liquidated where damages are reasonably ascertainable at time of breach, measured by fixed or established external standard, or by standard apparent from documents upon which plaintiffs based their claim); *Schade v. Diethrich*, 158 Ariz. 1, 760 P.2d 1050, 1063 (1988) (*en banc*) (liquidated where the evidence furnishes data which makes it possible to compute the amount of claim with exactness, without reliance upon opinion or discretion); *Woodline Motor Freight, Inc. v. Troutman Oil Co., Inc.*, 327 Ark. 448, 938 S.W.2d 565, 568 (1997) (prejudgment interest where the amount of damages is liquidated as a dollar sum, or if damages are definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion); *Segura v. McBride*, 5 Cal.App.4th 1028, 7 Cal.Rptr.2d 436, 444 (1992) (liquidated, as codified in Cal. Civ.Code § 3287, where damages are certain or capable of certainty through calculation); *Rotenberg v. Richards*, 899 P.2d 365, 367-68 (Colo.Ct.App.1995) (liquidated where contract sets forth method for determining amount due); *Four D's Inc. v. Mattera*, 1990 WL 290083, *3 (Conn.Super.Ct.1990), *aff'd*, 25 Conn.App. 308, 594 A.2d 484 (1991) (liquidated where claim is for an amount certain or susceptible of being made certain by mathematical calculations from factors which are or ought to be in possession or knowledge of the party to be charged); *Jarrell v. Delchester Oil Co.*, 1993 WL 189495, *1 (Del.Super.Ct.1993) (prejudgment interest where damages are liquidated or where amount of recovery is calculable);

District of Columbia v. Pierce Assocs., Inc., 527 A.2d 306, 311 (D.C.1987) (liquidated where claim is an easily ascertainable sum certain at time it arises); *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla.1985) (claim is liquidated and entitled to prejudgment interest if claimant has obtained verdict for out-of-pocket pecuniary loss); *Holloway v. State Farm Fire & Cas. Co.*, 245 Ga.App. 319, 537 S.E.2d 121, 124 (2000) (liquidated where amount is certain and fixed, either by the act and agreement of the parties or by operation of law); *Thor Elec., Inc. v. Oberle & Assocs.*, 741 N.E.2d 373, 377 (Ind.Ct.App.2000) (no liquidated distinction, but prejudgment interest allowed where damages are ascertainable in accordance with fixed rules of evidence and where only a simple mathematical calculation is required)[25]; *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky.1991) (liquidated where damages are made certain or fixed by agreement of parties or by operation of law); *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 657 So.2d 282, 315 (La.Ct.App.1995) (no liquidated distinction, but prevailing party is entitled to interest from date of breach if amount due is ascertainable); *Osgood v. Osgood*, 698 A.2d 1071, 1073 (Me.1997) (no liquidated distinction, but prejudgment interest to compensate an injured party for the inability to use money rightfully belonging to that party between the date suit is filed and the date judgment is entered); *United Cable Television of Baltimore Ltd. P'ship v. Burch*, 354 Md. 658, 732 A.2d 887, 894-95 (1999) (liquidated where claim is a sum certain); *Weiss v. Augat, Inc.*, 2000 WL 1765434, *4 (Mass.Super.2000) (no liquidated distinction; prejudgment interest given as of right where

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[25] Some states do not expressly classify damages as liquidated or unliquidated, but look to similar considerations such as whether the damages are readily ascertainable by mathematical calculation. *See, e.g., Close v. Isbell Constr. Co.*, 86 Nev. 524, 471 P.2d 257, 260 (1970); *Reliable Water Co. v. Monroe Township Mun. Utils. Auth.*, 146 N.J.Super. 291, 369 A.2d 949, 950-51 (App.Div.1977).

necessary to compensate a party for the loss of the use of his money and in order to make the party whole); *Simpson v. State Farm Fire and Cas. Co.*, 564 So.2d 1374, 1380-81 (Miss.1990) (liquidated where certain or capable of being made certain by mere calculation); *Kelleher Law Office v. State Comp. Ins. Fund*, 213 Mont. 412, 691 P.2d 823, 826 (1984) (liquidated where claim is capable of ascertainment by reference to an agreement or simple mathematical calculation); *Close v. Isbell Constr. Co.*, 86 Nev. 524, 471 P.2d 257, 260 (1970) (no liquidated distinction, but prejudgment interest where value of contract is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices); *McLaughlin v. Union-Leader Corp.*, 100 N.H. 367, 127 A.2d 269, 271 (1956) (no liquidated distinction, but prejudgment interest where money was due but unpaid); *Reliable Water Co. v. Monroe Township Mun. Utils. Auth.*, 146 N.J.Super. 291, 369 A.2d 949, 950-51 (1977) (liquidated where sum certain can be determined from formula even where obligation is disputed); *Bachman Chocolate Mfg. Co. v. Lehigh Warehouse & Transp. Co.*, 1 N.J. 239, 62 A.2d 806, 808 (1949) (interest allowed where damages are readily ascertainable or where amount of loss is ascertainable by a fixed standard forming a rational basis for the computation); *Lucero v. Aladdin Beauty Colls., Inc.*, 117 N.M. 269, </proga@dd>871 P.2d 365, 368 (1994) (liquidated where fixed and ascertainable); *Gunnarson v. State*, 70 N.Y.2d 923, 524 N.Y.S.2d 396, 398, 519 N.E.2d 307 (1987) (liquidated where damages are fixed, but prejudgment interest regardless of whether claim is liquidated); *Lazenby v. Godwin*, 60 N.C.App. 504, 299 S.E.2d 288, 291 (1983) (liquidated where amount of claim is obvious or easily ascertainable); *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 652 N.E.2d 687, 690-91 (Ohio 1995) (liquidated where damages are capable of ascertainment by reasonably certain calculations, or debts of a sum certain); *Erickson Hardwood Co. v. North Pacific Lumber Co.*, 70

Or.App. 557, 690 P.2d 1071, 1079 (1984) (liquidated where damages are ascertainable by simple calculation or by reference to generally recognized standards such as market price); *Burkholder v. Cherry*, 414 Pa.Super. 432, 607 A.2d 745, 748 (1992) (liquidated where amount due is ascertainable); *Enterprise Garnetting Co. v. Forcier*, 69 R.I. 455, 35 A.2d 1, 5 (1943) (liquidated where obligation to pay a sum certain at a fixed time); *Builders Transport, Inc. v. South Carolina Prop. and Cas. Ins. Guaranty Ass'n.*, 307 S.C. 398, 415 S.E.2d 419, 424 (App.1992) (liquidated where damages are certain or capable of being reduced to a certainty); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 928 (Tenn.1998) (prejudgment interest where liquidated claim for fixed amount or where amount of damages is ascertainable by computation or by any recognized standard of valuation); *State Farm Fire and Cas. Ins. Co. v. Vandiver*, 970 S.W.2d 731, 746 (Tex.App.1998) (liquidated where there is an ascertainable sum payable); *Estate of Fleming v. Nicholson*, 168 Vt. 495, 724 A.2d 1026, 1031 (1998) (liquidated where damages are readily ascertainable or where they can be calculated from established market prices); *Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 198 (4th Cir.1987) (applying Va. law) (no liquidated distinction; prejudgment interest to fully compensate plaintiff for delay in payment of money); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 15 P.3d 115, 132 (2001) (*en banc*) (liquidated where evidence furnishes data which makes it possible to compute the amount due with exactness); *Hardman Trucking, Inc. v. Poling Trucking Co., Inc.*, 176 W.Va. 575, 346 S.E.2d 551, 556 (1986) (prejudgment interest may be awarded on ascertainable pecuniary losses that are certain or capable of being rendered certain by reasonable calculation); *Millheiser v. Wallace*, 21 P.3d 752, 755 (Wyo.2001) (liquidated where amount due is readily computable by simple mathematical calculation).

c. Exxon's contention that the laws applicable to an award of discretionary interest in seven states, namely, Connecticut, Indiana, Mississippi, New Jersey, New Mexico, Tennessee, and Virginia, preclude such an award in those states.

For reasons stated above, the Court respectfully disagrees with Exxon's position and concludes that, as a matter of discretion, prejudgment interest should be awarded in each of the seven states. The following discussion further clarifies this conclusion with respect to the specific state law involved.

i. Connecticut.

Applying Connecticut law, the Court concludes that Exxon's detention of the monies which should have been credited to the Class Dealers throughout the Discount For Cash program was wrongful; that the amount was liquidated, and, based on the jury's findings, the Class Dealers diligently presented their claims. *See Brandewiede v. Emery Worldwide*, 890 F.Supp. 79, 83 (D.Conn.1994). As acknowledged by Exxon, the date of accrual is within the Court's discretion. *Sears Roebuck and Co. v. Bd. of Tax Review of the Town of West Hartford*, 241 Conn. 749, 699 A.2d 81, 89 (1997). Accrual should begin sometime after the money was wrongfully withheld. *Spearhead Constr. Corp. v. Bianco*, 39 Conn.App. 122, 665 A.2d 86, 93 (1995). Taking all the equities into consideration, the Court holds that prejudgment interest shall accrue from the date of the breach. The earliest date of breach would be March 1, 1983, depending on when each Connecticut Class Dealer's contract with Exxon was in effect, and when the Class Dealer commenced to purchase motor fuel under that contract. Thus, if the first contract was in effect on January 1, 1984, but motor fuel was not purchased until January 15, 1984, the date of breach would be January 15, 1984. Of course, each class dealer must establish the beginning date of its contract(s) with Exxon during the Class Period, the dates the contract(s) were in effect during

the Class Period, and the total gallons of motor fuel purchased under the contract(s) on a yearly basis. This is the same calculation necessary to determine compensatory damages. Once compensatory damages are determined for the Class Period, the prejudgment interest rate would apply to that sum on a year-by-year basis through the date of Final Judgment. For instance, if a class dealer in Connecticut entered the first of a series of contracts with Exxon during the Class Period on January 1, 1984, and purchased motor fuel from January 15, 1984, through August 30, 1994 [the conclusion of the DFC program], the prejudgment interest rate would apply on a yearly basis to compensatory damages and then would apply on the aggregate compensatory sum through the date of Final Judgment. The Final Judgment would be entered for the total compensatory damages and prejudgment interest for that Class Dealer.

ii. Virginia.

Exxon contends that Virginia does not ordinarily allow prejudgment interest when claims are unliquidated and disputed between the parties. *Skretvedt v. Kouri,* 248 Va. 26, 445 S.E.2d 481 (1994). While this may be so, this Court has determined that the claims are liquidated. It is within the Court's discretion under Virginia law to award interest in order to make the dealers whole for the loss sustained by not receiving the money at the time it was initially due. *See Ragsdale v. Ragsdale,* 30 Va.App. 283, 516 S.E.2d 698, 702 (1999).

iii. Indiana.

Again, since the Court has found the claims to be liquidated and ascertainable, prejudgment interest is permitted under Indiana law. It is within the Court's discretion under Indiana law to fully compensate the dealers for the loss

suffered in being deprived of the use of the money Exxon owed to them. *See Abex Corp. v. Vehling*, 443 N.E.2d 1248, 1259-60 (Ind.Ct.App.1983).

iv. Mississippi.

In Mississippi, the award of prejudgment interest is normally left to the discretion of the trial court. *Warwick v. Matheney*, 603 So.2d 330, 342 (Miss.1992). Prejudgment interest may be allowed in cases where the amount due is liquidated when the claim is originally made or when the denial of a claim is frivolous or in bad faith. *Id.* Furthermore, Mississippi acknowledges the judicial authority to award the prevailing party prejudgment interest in breach of contract suits. *Sunburst Bank v. Keith*, 648 So.2d 1147, 1153 (Miss. 1995). As noted above, the claims in this case were liquidated, and it is in the interests of justice to award the Plaintiffs liquidated damages in order to make them whole. It is therefore appropriate to award prejudgment interest to the Mississippi Class Dealer's from the date of filing of the Complaint. *Id.* (acknowledging that, pursuant to Miss.Code Ann. § 75-17-7, prejudgment interest may not be awarded prior to the filing of the complaint).

v. New Jersey.

The parties agree that under New Jersey law, the Court has broad discretion to grant or deny prejudgment interest on contract claims in accordance with principles of equity and the goal of compensating the plaintiffs' for lost interest. *See Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1070 (1988); *Rova Farms Resort Inc. v. Investors Ins. Co. of Amer.*, 65 N.J. 474, 323 A.2d 495, 512 (1974); *Musto v. Vidas*, 333 N.J.Super. 52, 754 A.2d 586, 597 (App.Div.2000). The primary consideration in awarding prejudgment interest is that "the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for

the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled." *Rova Farms*, 323 A.2d at 512. The court's discretion with respect to the award also extends to the time interest accrues and the rate to be applied. *Musto*, 754 A.2d at 598.

Under New Jersey law, the Court concludes that Exxon's detention of the monies due and owing to the Class Dealers throughout the DFC program was wrongful, and that prejudgment interest should be awarded from the later of March 1, 1983, or when the New Jersey Class Dealer in question first purchased motor fuel under a DFC contract with Exxon (*see* discussion of Connecticut law above).

vi. New Mexico.

New Mexico Statute § 56-8-3[26] allows prejudgment interest in cases on money due by contract, money received to the use of another and retained without the owner's consent, and money due on the settlement of matured accounts. The obligation to pay prejudgment interest under § 56-8-3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's

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[26] Section 56-8-3 provides:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:
>
> A. on money due by contract;
>
> B. on money received to the use of another and retained without the owner's consent expressed or implied; and
>
> C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

funds). *See Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 819 P.2d 1306, 1320 (1991). Prejudgment interest is awarded as a matter of right only when a party has breached a duty to pay a definite sum of money or "the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices." *Smith v. McKee*, 116 N.M. 34, 859 P.2d 1061, 1063 (1993) (*quoting Kueffer v. Kueffer*, 110 N.M. 10, 791 P.2d 461, 463 (1990)). In cases falling under § 56-8-3, where the amount owed is not fixed or readily ascertainable, the trial court may in its discretion award prejudgment interest of not more than fifteen percent. *Aztec Well Servicing Co. v. Property & Cas. Ins. Guar. Ass'n*, 115 N.M. 475, 853 P.2d 726, 737 (1993).

In this case, the claims of the Class Dealers are liquidated and ascertainable, and prejudgment interest is due and owing as a matter of right. *See Grynberg v. Roberts*, 102 N.M. 560, 698 P.2d 430, 432 (1985) ("where the amount of indebtedness under the contract is ascertainable by the breaching party, the injured party is entitled to interest as a matter of right on those monies at the legal rate"). Furthermore, even if they were not, the equities weigh in favor of granting prejudgment interest to the Class Dealers in order to compensate them for the loss of the use and earning power of their money. Interest is due from the date payments first became due, which in this case is the later of March 1, 1983, or when the New Mexico Class Dealer in question first purchased motor fuel under a DFC contract with Exxon.

vii. Tennessee.

Under Tennessee law, the award of prejudgment interest is within the sound discretion of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn.1998). Principles of equity guide this determination, and the court must determine whether the award of prejudgment interest is fair, given the particular facts of the case. *Id.* The purpose of the

award of interest is to fully compensate the plaintiff for the loss of the use of the funds to which he or she was legally entitled. *Id.* Courts also consider whether the amount of the obligation is certain, or can be ascertained by a proper accounting, whether the amount is disputed on reasonable grounds, and whether the existence of the obligation itself is disputed on reasonable grounds, but these factors are not dispositive. *Id.*

As noted above, the claims in this case are liquidated and readily ascertainable, and equitable principles weigh in favor of granting prejudgment interest to the Class Dealers to compensate them for the loss of the use of the funds to which they were legally entitled. Pursuant to Tenn.Code Ann. § 47-14-109(c),[27] interest began accruing from the day when the debt became payable, which in this case is the later of March 1, 1983, or when the Tennessee Class Dealer in question first purchased motor fuel under a DFC contract with Exxon.

5. Determination of Prejudgment Interest Rates and Accrual Dates.

In order to calculate the amount owed to individual class members in the various states, it is necessary to specify, for each jurisdiction, the applicable rate or rates of interest from the accrual date from which interest may run, whether the

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[27] Tenn.Code Ann. § 47-14-109(c), entitled 'When interest accrues,' provides:

> (a) Interest on negotiable and nonnegotiable instruments shall accrue according to the terms of the instrument; otherwise, interest on the instrument shall accrue as provided in § 47-3-112.
>
> (b) Liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned.
>
> (c) In all other cases, the time from which interest is to be computed shall be the day when the debt is payable, unless another day be fixed in the contract itself.

interest is simple or compounded within the jurisdiction, and any other unique rules in each jurisdiction relating to the manner of computation of interest.[28] Plaintiffs have previously filed and served a schedule reflecting their view, on a jurisdiction-by-jurisdiction basis, of the appropriate rate of interest and the manner of interest calculation, citing to the Court the appropriate authorities for those views [D.E. # 1410]. Within 15 days from the date of this Order, Plaintiffs will supplement their schedule, as they deem appropriate, in a manner consistent with this Order. Thereafter, Exxon, within 30 days from the entry of this Order, shall file and serve a pleading identifying any disagreements with the interest calculation schedule provided by Plaintiffs. Within 10 days of service, Plaintiffs shall file any additional materials they believe are appropriate regarding the rate and method of calculating prejudgment interest in each jurisdiction. Exxon will have 5 days to reply thereto. In the event any discovery is required, the parties shall so specify with particularity in their pleadings.

The Court shall reserve consideration of the interest rate issue until it is determined if differences exist and if discovery is requested. Ultimately, the Court will enter an

[28] For instance, under Conn. Gen.Stat. § 37-3, the maximum interest rate is 10% per annum. The Court has the discretion to set a lower rate. *Sears Roebuck and Co.*, 699 A.2d at 89. In the absence of a specific requirement of a particular rate of interest, Exxon argues that the rate should be the one used for judgment found in 28 U.S.C. § 1961. Those rates are based upon the percentage investment yield on 52-week treasury bills and reflect the value of money during the applicable time period. Interest is to be computed daily until the date of payment and compounded annually. 28 U.S.C. § 1961(b). According to Exxon, using these rates will serve the purpose of "compensating" Connecticut plaintiffs for the lost use of money owed on their claims. In addition, in the absence of a state specific rate, as a national class action, Exxon argues it is appropriate to use this federal rate. The Court shall resolve all such matters on a state-by-state basis once the parties final positions are briefed.

order making findings as to the applicable interest rate and the rules of applying interest in each jurisdiction involved in this matter. In that regard, Exxon has argued that, in the absence of a specific requirement of a particular rate of interest, the rate should be based upon the percentage investment yield on 52-week treasury bills and reflect the value of money during the applicable time period. It is premature for the Court to rule on this matter at this time. The Court reserves to do so upon the completion of the parties' submissions.

IV. *THE CLAIMS ADMINISTRATION PROCESS*

The Court must now proceed with a claims administration process that will consist of a notice, a claims period, a process verification of claims, and entry of a Final Judgment, or series of Final Judgments applicable to distinct sub-classes of putative members in accordance with Fed.R.Civ.P. 54(b),[29] and actual distribution.

A. Opt Outs.

Plaintiffs advise that the vendor retained for purposes of publishing the notice of class certification received notices from 61 persons who may be members of the class who chose not to participate in the outcome. Plaintiffs filed and served a schedule of all dealers who have potentially opted out and have provided to Exxon all documents received. Within 15 days from the date of this Order, Exxon will be required to identify if they have any objections to the opt out list. If differences exist, the Court will thereafter determine the matter.

[29] For instance, one final judgment could be entered as to all putative class members whose claims are undisputed by Exxon, while disputed claims proceed through the remainder of the claims administration process.

B. Claims Handling Process; Coordination with Clerk of Court.

Within 15 days from the date of this Order, the Clerk of the Court, or his designee, shall meet with the parties to develop a process for the filing, handling, and administration of the individual class members' claims. Within 30 days thereafter, the Clerk of the Court shall submit to the Court his proposed procedures for the handling of individual class member claims. The parties shall have 15 days after service in which to file any objections or counter-proposals.

C. Class Notice and Related Matters.

The parties shall meet and confer within 15 days from the date of this Order concerning the form and manner of notice to be provided to class members to start the claims process, the time within which class members shall submit their claims, and the time period within which Exxon may file objections to claims [consistent with this Order]. The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. Each claim shall be notarized and should include proof that the person or entity submitting the form was an Exxon dealer during the class period; proof that the person or entity submitting the claim has the capacity to sue;[30] the identity of the station or stations at which the claimant was an Exxon dealer; and the period of time at which such claimant was an

[30] There may be disputes between dealers as to who owns the claim for a particular station. In order to resolve the disputes, each class member submitting a claim must show he or she is the real party in interest with regard to the Sales Agreements on which the claim is based. For example, a dealer who sells or assigns his rights under a Sales Agreement to a new dealer may (or may not) have reserved any claims he or she has in this litigation. If so, it ultimately will be necessary to determine which dealer is the owner of the claim under that Sales Agreement.

Exxon dealer at each station.[31] To the extent there is no agreement, the parties shall submit their proposals within 15 days. The Court reserves to resolve any disagreements between the parties as to these matters.

D. Exxon's Participation in the Claims Administration Process.

1. Exxon' claim to right of set-off.

A set-off is a permissive counterclaim. *See* 3 James Wm. Moore *et al.*, Moore's Federal Practice, § 13.31 (3d. ed.2001). In a class action, it may be filed during the claims administration process solely to defeat or diminish the amount of a class member's recovery, but may not exceed the amount of the claim. *Id.*

Here, Exxon claims potential set-offs relating to unpaid motor fuel charges, unpaid rent, and the like. While a court ordinarily must have an independent basis for subject matter jurisdiction over permissive counterclaims, there is a well-recognized exception to this requirement in the case of a permissive counterclaim that is interposed defensively by way of set-off solely to defeat or reduce a plaintiff's recovery but which does not seek affirmative relief. *See* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1422 (2d ed.1990); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D.Pa.1976) ("[S]et-offs, employed defensively . . . fall within the 'defensive set-off' exception to Rule 13(b) and may be asserted in the federal forum despite the absence of an independent jurisdictional basis."); *Kedziora v. Citicorp Nat'l Servs., Inc.*,

[31] For example, two dealers may have been dealers at the same station during a particular year. To avoid duplicative recovery, it will be necessary to determine the precise dates during which each was a dealer at that station. Because Exxon's station records only contain monthly data on fuel volumes, there also may be disputes between such dealers over the particular gallonage to which each is entitled.

901 F.Supp. 1321, 1332 (N.D.Ill.1995) ("A defensive set-off, unlike a permissive counterclaim, 'does not need independent jurisdictional grounds even though the claim is unconnected with the transaction or occurrence on which the main claim is based.'") (citation omitted); *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 457 (E.D.Pa.1980) ("Assertion of a defensive set off is the one generally recognized exception to this rule that a permissive counterclaim requires an independent basis for jurisdiction."). For this reason, the Court has jurisdiction to hear Exxon's set-off claims. Even if Plaintiff is correct that this longstanding exception may no longer be in effect after the adoption of the supplemental jurisdiction statute, 28 U.S.C. § 1367, the Court would exercise its discretion to hear them in order to assure due process, equity, and fair play. Any argument relative to bar by virtue of applicable statutes of limitation is premature.

Although the Plaintiffs contest Exxon's right to file set-offs, virtually every court to consider the issue has concluded that the appropriate time to assert counterclaims against individual class members is during the damage phase of the case. [*See* discussion below]. Where, as here, the calculation of each class member's individual damages has yet to occur, the time to consider any claim of set-off is during the claims administration process. As a practical matter, the claims administration process is the first time at which there is any meaningful opportunity to assert rights of set-off against individual class members.

The leading case on the proper procedure for handling offsets against individual class members is *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485 (S.D.N.Y. 1973). There, a group of grocers sued several bakers alleging a conspiracy to fix the price of bread in New York City. The court certified the case as a class action, and the defendants attempted to assert counterclaims against individual members of the class. The court struck the counterclaims and held that

an individual member of a class is not a "party" against whom a counterclaim can be asserted. *Donson Stores*, 58 F.R.D. at 489. The court held that claims against individual class members could be asserted at the *damages phase* of the case on a class member-by-class member basis. *Id.* at 489-90. *See also Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D.Pa.1975) (finding that compulsory liquidated counterclaims could be effectively presented when individual claims for damages are presented); *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 60 F.R.D. 5, 8 (N.D.Ill.1973) ("We believe the better view is that class members who file claims become 'parties' (for the purpose of Rule 13(a)) and that compulsory counterclaims must then be filed against them or be barred."); *Serpa v. Jolly King Rests., Inc.*, 1974 WL 941 (S.D.Cal.1974) ("The Court concludes that *Donson* sets forth the better view of law and procedures, especially in view of Federal Rule 13's requirement that counterclaims be brought against opposing parties and the very serious question whether unnamed members before liability is established are indeed opposing 'parties.'"); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 349 (E.D.Pa. 1976)("[C]ounterclaims may be brought against unnamed class members only if and when these class members intervene or file claims in this action.").

Plaintiffs suggest that a set-off procedure, coupled with a determination of individual compensatory damages and prejudgment interest, is a "judicial train wreck" which will result in undue delay and prejudice to class dealers. However, Exxon is not permitted a "free ride" on the so-called "judicial train wreck." The prejudgment interest clock still will be ticking, and Exxon will be required to place into escrow the compensatory damages and prejudgment interest calculated as to the disputed class member through the date of Final Judgment, in a manner described below. Perhaps this fact alone will make set-off claims impracticable. Adjustments will be required only if a set-off is required by law.

The review and determination of set offs will occur by a Special Master in accordance with Fed.R.Civ.P. 53. The Court reserves to issue a further order establishing all necessary procedures.

2. Exxon's Right to Participate in the Claims Administration Process and to File Objections.

Plaintiffs argue that Exxon has no right to participate in the claims administration process and to file objections. The Court agrees with Exxon that Plaintiffs' contention defies basic due process. Exxon is a real party in interest. It would have to pay any damages determined to be due. It thereby has the right to appear and participate, including to object and oppose any unfounded or incorrect claim.

The Court therefore concludes that Exxon may participate during the claims administration process, and otherwise file objections. Such objections or requests may pertain to: (i) filing set-offs, as addressed above; (ii) challenging whether the class member was a dealer during the Class Period; (iii) challenging the time period the class member was a dealer during the Class Period; (iv) contesting the amount of gallons purchased by the class member during the Class Period on a yearly basis; (v) arguing the proper application of any applicable statute of limitations and release as a result of the Court's rulings; (vi) requiring a determination of "Good Faith" amount of claims for subject matter jurisdiction purposes under 28 U.S.C. § 1332, when necessary; and (vii) raising any purported miscalculation of compensatory damages and prejudgment interest for that class dealer. Where there is a dispute between, or among, class dealers as to their participation in the compensatory and prejudgment interest award, Exxon shall have no standing except to contest the total amount of the award at issue.

E. Claims Procedures.

The parties are directed to meet and confer within 45 days from the date of this Order concerning the Claims Administration Process set forth below and, within 15 days thereafter, file with the Court any objections or recommendations each may have regarding the process. By separate order, the Court shall finalize the process after hearing from the parties. *While the claims administration process may proceed through notice and receipt of claims, no further action through the appointment of the Claims Administrator, or the determination of individual claims, shall proceed until the Eleventh Circuit determines if it will accept an appeal prior to final judgment pursuant to 28 U.S.C. § 1292(b).*[32] At a minimum, the claims administration process shall include the following elements:

1. A special master, who shall serve as the Claims Administrator (hereinafter the "Claims Administrator"), shall be appointed by the Court in accordance with Fed.R.Civ.P. 53. Within the time specified above, the parties shall confer about the appropriate qualifications of the Claims Administrator and his or her powers pursuant to Fed.R.Civ.P. 53(c), and offer their joint recommendations concerning such appointment, powers, or other related subjects related to the claims

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[32] As an alternative means of bringing the issues associated with this case to the attention of the Eleventh Circuit as soon as possible, the Court is prepared to enter a Final Judgment for the named Plaintiffs under Fed.R.Civ.P. 54(b). Such a final judgment will not prejudice the claims of the remaining class members and will also allow an immediate full appeal on the merits while the claims administration process for the balance of the class is being established and implemented, and the appellate process is initiated pursuant to 28 U.S.C. § 1292(b). *Accordingly, the parties are directed to file and serve, within 30 days from the date of this Order, the necessary information upon which to enter Final Judgment for the named plaintiffs consistent with this Order. In the event that an evidentiary hearing is required so as to enable a final judgment to be entered, the parties shall notify the Court as soon as possible.*

administration process. The costs of the claims administration process shall be paid by Exxon. These costs include the cost of the class notice, the cost of distribution to the class, and the fees payable to the Claims Administrator, except that any fees to be paid to the Claims Administrator related to addressing and later resolving conflicting claims shall be paid from the compensatory damages and prejudgment interest awarded to the successful claimant. Such claimant may then recover such fees and costs from the unsuccessful claimants.

2. The Claims Administrator shall review each claim filed to determine if the information provided is sufficient and to request additional information as necessary; shall establish, as necessary, the "Good Faith" amount of claims for purposes of the Court's jurisdiction under 28 U.S.C. § 1332; shall determine if there are any conflicts among the various claims and shall identify the claimants involved and the nature of the conflict; shall compute compensatory damages and prejudgement interest in a manner consistent with the orders of this Court; shall initiate, as necessary, a state interpleader action between or among any contesting claimants; and shall open an interest bearing escrow account at a reputable financial institution acceptable to the parties.

3. The Claims Administrator's determination of the total compensatory damages and prejudgment interest, less set-offs, shall be in the form of a report consistent with Fed.R.Civ.P. 53(e).[33] Once Exxon has received the report from the Claims Administrator, it immediately shall transfer to the Claims Administrator escrow account [or individual claimant escrow accounts] a sum certain in United States dollars representing the total compensatory damages and prejudgment interest due to each claimant which shall be held

[33] The Claims Administrator may file multiple reports pertaining to sub-classes of putative plaintiffs, such as where Exxon does not contest the Dealers' claims.

in escrow pending further direction from the Court. Any accumulated interest shall be applied to the additional prejudgment interest owed to the claimant through the date of Final Judgment. Pursuant to further court order, Exxon shall further transfer to the escrow account any sum representing court costs as directed by the Court, and such compensation as fixed by the Court for the Special Master pursuant to Fed.R.Civ.P. 53(a).

4. The Claims Administrator's final report shall identify each verified claimant on a state-by-state basis, together with the total compensatory damages and prejudgment interest owed to the claimant, less any pro rata share of costs and attorney's fees as directed by court order. In addition, the Claims Administrator shall calculate additional prejudgment interest through the date of Final Judgment [which shall be provided to him or her by the Court], less any accumulated interest in the escrow account attributable to the claimant. The Court Administrator shall notify Exxon of the additional prejudgment interest due by written statement setting forth the calculations involved and providing any necessary documentation to support the calculation. Prior to the date of the Final Judgment, Exxon shall transfer to the escrow account the additional sum, as directed by the Claims Administrator.

5. In the event of disputes between or among claimants, the Claims Administrator shall calculate the compensatory damages and prejudgment interest at issue and include the amount at issue and the nature of the dispute in the final report. Exxon shall transfer the disputed amount(s) to the Claims Administrator in the manner set forth above. At such point, Exxon shall have no further responsibility or liability to the competing claimants, except to pay into the escrow account any additional prejudgment interest through the date of Final Judgment. Upon receiving competing claims, the Claims Administrator shall direct the parties to private mediation. In the event mediation is unsuccessful, the Claims Administrator

shall file interpleader actions following entry of the Final Judgment.

6. The Court shall issue a Final Judgment or series of Final Judgments which sets forth the amounts due to each claimant. Where there are competing claims, the Final Judgment shall specify, upon report from the Claims Administrator, the nature of the dispute and the sum certain in dispute. The Final Judgment shall direct the Claims Administrator to file an interpleader action against the competing claimants in the appropriate state jurisdiction involved in the event mediation is unsuccessful. The Claims Administrator shall be entitled to retain counsel for such purpose. Counsel's fees shall be paid from the escrow account applicable to the claimants involved. The Claims Administrator shall make payment to the appropriate claimant once the state judgment is final.

7. Any disputes by Exxon as to the matters to which it has standing [*see* § IV(D)(2), *supra*], shall be addressed by the Claims Administrator in accordance with Fed.R.Civ.P. 53, and resolved by the Court prior to entry of Final Judgment.

F. Plaintiffs' Attorneys' Fees and Costs.

Within twenty (20) days from the date of this Order, Plaintiffs shall submit a proposal concerning how class attorneys' fees and costs shall be awarded and distributed, and, to the extent that costs incurred are not properly chargeable against Exxon, how additional costs shall be allocated between and among the named and putative plaintiffs. Exxon shall reply, if necessary, within ten (10) days. Plaintiffs shall file a surreply in five (5) days. The Court reserves to enter an order on this procedure. Such order shall be distributed to the named plaintiffs and ultimately to the putative class members who file claims.

V. *CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)*

It is the opinion of this Court that an immediate appeal to the Eleventh Circuit Court of Appeals of this Order and accompanying Judgment on Special Verdict by either or both parties is appropriate and should be permitted. Pursuant to 28 U.S.C. § 1292(b), the district court may certify that an order is appropriate for interlocutory appeal if the court believes that "such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). All of the criteria are present here.

The Order in this case is the culmination of almost ten years of litigation. The question of whether an aggregate compensatory and prejudgment interest award by Final Judgment may be entered at this juncture preceding the claims administration process in a class action, and thereby creating a *cy pres* fund from which Exxon would be divested of all rights, is a controlling question of law as to which there is substantial ground for difference of opinion. Closely related, the second question of whether the 1990 amendments to 28 U.S.C. § 1367 extended supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy, thereby overruling *Zahn,* has not only resulted in a Circuit split, but an equal division among participating Justices of the United States Supreme Court. It poses a question over which this Circuit has not yet opined.

An immediate appeal from this Order, together with the judgment on Special Verdict entered in accordance herewith, will materially advance the ultimate termination of the litigation by giving direction to the forthcoming claims administration process, thereby avoiding significant lost time

and unnecessary expense if the legal conclusions set forth in this Order are ultimately reversed.

Even if the parties proceed, as this Court has directed, such that a Final Judgment is entered with respect to the named plaintiffs pursuant to Fed.R.Civ.P. 54(b), this Court still believes certification of this order for interlocutory review is warranted for the reasons stated, as it affects the remaining thousands of putative class members.

Finally, while appeal of this Order is interlocutory, this Court urges the Eleventh Circuit Court of Appeal to consider all legal issues directed to the Judgment on Special Verdict, which this Court has directed the Clerk of Court to enter, as part of its pendent appellate jurisdiction. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 ("Although the compel order is clearly an interlocutory order over which we would not normally have jurisdiction, we may exercise pendent appellate jurisdiction 'when a non-appealable decision is inextricable intertwined with an appealable decision or when review of the former [is] necessary to ensure meaningful review of the later.'") (citation omitted). This Court and the parties will greatly benefit from the Eleventh Circuit's review and early determination of the myriad of legal issues associated with this case before untold additional attorneys' fees and costs are incurred in reaching a Final Judgment for both the named and putative class members. For instance, it would not make sense to complete a claims administration process to thousands of Class Dealers if the Eleventh Circuit should determine that those dealers are barred from collecting damages because of their releases with Exxon.

Therefore, this Court certifies that an immediate appeal is in the best interest of materially advancing the ultimate termination of this litigation. The parties are reminded that in order to invoke the discretionary review of the Eleventh Circuit they must apply for review within ten days from the date of this order. 28 U.S.C. § 1292(b).

WHEREFORE, it is ORDERED:

1. Plaintiff's Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment is granted in part and denied in part [D.E. # 1409], as provided in this order.

2. Plaintiffs' claim to entry of an aggregate judgment in favor of the class as a whole is DENIED.

3. The Clerk of Court is directed to enter judgment in the manner set forth in Attachment A to this Order.

4. Plaintiffs' pleadings are amended so that diesel fuel purchases are included in the calculation of class members' compensatory damages.

5. The Ohio statute of limitations applies and gallons purchased by Dealers residing in Ohio prior to May, 1987, are excluded from the compensatory damage calculation.

6. The Florida statute of limitations, Fla. Stat. § 95.11(2)(b), does not bar Plaintiffs' claims in that, under the "delayed discovery doctrine," the cause of action did not accrue until November of 1990.

7. Plaintiffs are entitled to prejudgment interest, for the reasons set forth in this Order. Prejudgment interest rates and accrual dates shall be determined as set forth in this Order.

8. With regard to Claims Administration, the parties and Clerk of Court shall comply with the Court's findings, conclusions and orders on "opt outs," claims handling processes, and class notice, as set forth in this Order.

9. Exxon is entitled to participate in the Claims Administration Process, and file set-offs and objections, as warranted, as set forth in this Order.

10. The parties shall file objections to the Claims Administration Process set forth in this Order as directed. The Court reserves to finalize the process after hearing from the parties and the Clerk of Court.

11. The Court reserves to issue a Final Judgment or series of Final Judgments, as set forth in this Order, as well as to order attorneys' fees and costs.

12. Certification of interlocutory appeal to the Eleventh Circuit Court of Appeals is hereby provided pursuant to 28 U.S.C. § 1292(b), for the reasons stated in this Order. In any event, the parties are directed to proceed forward with respect to a Final Judgment for the named plaintiffs pursuant to Fed.R.Civ.P. 54(b), as directed by this order.

EXHIBIT "A"

JUDGMENT ON SPECIAL VERDICT

This action came on for trial before the Court and a jury, Honorable Alan S. Gold, United States District Judge, presiding, and the issues in the Special Verdict having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged, pursuant to Fed.R.Civ.P. 58, that judgment is hereby entered in favor of Plaintiffs, and against the Defendant, upon the Special Verdict [D.E. # 1395] rendered by the Jury on February 20, 2001. The Special Verdict made certain factual findings and established a damage factor in favor of the Class Plaintiffs in this case. Those findings and the damage factor shall govern and apply in all further proceedings involving the Class Plaintiffs and Exxon Corporation in the Claims Administration Process.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed May 31, 2001]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC. *et. at.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

SUA SPONTE ORDER ON SUBJECT MATTER JURISDICTION

It is fundamental that a federal court must continue to inquire *sua sponte* into its subject matter jurisdiction. *Morrison v. Allstate*, 228 F.3d. 1255, 1261 (11th Cir. 2000) (citing *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 776 F.2d 1249, 1251 (11th Cir. 1985) ("A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises.").

In this putative diversity class action, the Court's subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332, the diversity statute. In that regard, Exxon, in its Response in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment, has brought to the Court's attention the recent decision of the Eighth Circuit in *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000). Exxon argues that the majority of Courts of Appeals now have concluded that 28 U.S.C. § 1367 did not

overrule the United States Supreme Court in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

The issue of whether the 1990 amendments extend supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy has not yet been addressed in the Eleventh Circuit, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1272 (11th Cir. 2000), although this Court, in *Leszczinski v. Allinace Ins. Co.*, 176 F.R.D. 659 (S.D. Fla. 1997), citing *In Re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) and *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1966), has ruled, in another context, that the 1990 amendment did overrule *Zahn*.

Exxon claims, however, that the recent trend in appellate decisions, as well as the Eleventh Circuit's decision in *Morrison*, makes it likely that this Court lacks subject matter jurisdiction over the claims of any class member whose claims do not satisfy the minimum jurisdictional amount requirement of 28 U.S.C. § 1332. Exxon further argues that, even if an aggregate damage award were permissible, the Court could not include in such an award damages attributable to claims over which it has no jurisdiction.

WHEREFORE, because of the importance of this issue, it is ORDERED that the parties shall present further argument on subject matter jurisdiction issues at oral argument set on June 7th, 2001 at 9:00 A.M. At such time, Plaintiffs also should be prepared to address if their claim for subject matter jurisdiction relies in whole or in part on a unified, indivisible interest in a common fund, thereby permitting them to add together, or "aggregate," their individual stakes to reach the amount in controversy threshold, *see Morrison*, 228 F.3d at 1262 through 1264, or otherwise relies on any other jurisdictional basis consistent with applicable case law.

ORDERED this 31th Day of May, 2001.

/s/ [illegible]
ALAN S. GOLD
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Feb 20, 2001]

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

UNITED STATES MAGISTRATE
JUDGE ANDREA M. SIMONTON

SPECIAL VERDICT FORM

1. Did the Dealers prove, by a preponderance of the evidence that the facts and circumstances that existed during the Discount for Cash Program were not the "normal case"?

Yes ✓ No__

IF YOU ANSWERED QUESTION 1 "NO," YOU SHOULD SKIP TO QUESTION 3. IF YOU ANSWERED QUESTION 1 "YES," PLEASE PROCEED TO QUESTION 2.

2.a. By the preponderance of the evidence, what do you find was the nature and extent of Exxon's good faith

obligation to its Dealers during the Class Period? Was Exxon:

(i) Required to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes ✓ No__

OR

(ii) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iii) Required to reduce the wholesale price of motor fuel by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iv) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(v) Do you find by the preponderance of the evidence that Exxon's duty of good faith

was other than as stated or in some combination of the above?

Yes __ No✓

OR

If so, please set forth below your understanding of the nature and extent of Exxon's good faith obligation to its Dealers during the Class Period, based upon the preponderance of the evidence.

State: _____

_____

_____

_____

_____

_____

_____

2.b With respect to any good faith obligation you found in answer to Question 2.a., did the Plaintiffs prove by a preponderance of the evidence that Exxon failed to set its wholesale prices of motor fuel to its dealers in good faith during the Class Period?

Yes ✓ No__

PLEASE PROCEED TO QUESTION 3.

3. By the preponderance of the evidence, what do you find was the nature and extent of Exxon's contractual obligation, if any, to its dealers during the Class Period? Was Exxon:

(i) Required to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit cost recovery fee during the Class Period?

Yes ✓ No__

OR

(ii) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iii) Required to reduce the wholesale price of motor fuel by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iv) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(v) Do you find by a preponderance of the evidence that Exxon was contractually obligated in some other manner or in some combination of the above?

Yes __ No✓

if so, please set forth below your understanding of the nature and extent of that contractual obligation.

State: _____

_____

_____

_____

_____

IF YOUR ANSWER TO ALL PARTS OF QUESTION 3 IS "NO" AND YOU ALSO ANSWERED QUESTIONS 1 OR 2.b "NO," YOUR VERDICT IS COMPLETE AND YOU SHOULD THUS SIGN AND DATE THE VERDICT FORM AND RETURN TO THE COURTROOM.

IF YOU ANSWERED QUESTION 1 AND 2.b "YES," AND ANSWERED ALL PARTS OF QUESTION 3 NO, PLEASE PROCEED TO QUESTION 5.

IF YOU ANSWERED ANY PART OF QUESTION 3 YES, PLEASE PROCEED TO QUESTION 4.

4. Did the Dealers prove by a preponderance of the evidence that Exxon failed to reduce the wholesale price in the manner you previously have found for any period between March 1983 to August 1994?

Yes ✓ No__

IF YOUR ANSWER TO QUESTION 4 IS "YES" OR YOUR ANSWERS TO QUESTIONS I AND 2.b. ARE YES, PLEASE PROCEED TO QUESTION 5.

IF YOUR ANSWER TO QUESTION 4 IS "NO" AND YOUR ANSWER TO QUESTION 1 OR 2.b. IS NO, PLEASE SIGN AND DATE THE SPECIAL VERDICT FORM AND RETURN TO THE COURTROOM.

5. If you answered "Yes" to Question 2.b and/or Question Number 4, then in the chart below indicate by placing a check in the appropriate blank provided in the left column, for each of the time periods shown,

whether you find that the Dealers proved by a preponderance of the evidence that Exxon failed to appropriately reduce the wholesale price of motor fuel. For each time period in which you find that Exxon failed to reduce the wholesale price in whole or part, in the right column state the amount in cents per gallon, by which Exxon failed to provide the reduction.

On the other hand, for each year you find that Plaintiffs failed to prove that Exxon did not appropriately reduce the wholesale price to offset the credit cost recovery fee, you should enter a zero.

Did Exxon fail to reduce the wholesale price to offset the 3% fee?

If "YES," amount by which Exxon failed to reduce the wholesale price

DATE	YES	NO	Amount (¢ per gallon)
1983 (March-December	✓		1.40
1984	✓		1.40
1985	✓		1.34
1986	✓		1.03
1987	✓		1.04
1988	✓		1.07
1989	✓		1.18
1990	✓		1.33
1991	✓		1.24
1992	✓		1.32
1993	✓		1.35
1994 (January-August)	✓		1.33

IF YOU ENTERED A ZERO IN EACH OF THE YEARS, YOUR VERDICT IS COMPLETE AND YOU NEED NOT ANSWER THE REMAINING QUESTIONS. PLEASE SIGN AND DATE THE SPECIAL VERDICT FORM AND RETURN TO THE COURTROOM.

BUT IF YOU ANSWER ANY PORTION OF THIS QUESTION WITH AN AMOUNT OTHER THAN ZERO, PLEASE PROCEED TO QUESTION 6.

6.a. Did the Dealers prove by clear and convincing evidence that Exxon fraudulently concealed facts from them concerning a breach of its Sales Agreements with the intent of leading the Dealers into not filing suit against Exxon?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 7.a. IF YOU ANSWERED "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 6.b.

6.b. Did the Dealers prove by a preponderance of the evidence that Exxon fraudulently concealed facts from them concerning a breach of its Sales Agreements with the intent of leading the Dealers into not filing suit against Exxon?

Yes __ No__ [LLEGIBLE]

7.a. Did the Dealers prove by clear and convincing evidence that they exercised due diligence, but nonetheless were unable to know of facts indicating a possible claim against Exxon prior to November 1990?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 8.a. IF YOU ANSWERED "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 7.b.

7.b. Did the Dealers prove by a preponderance of the evidence that they exercised due diligence, but nonetheless did not know of facts indicating a possible claim against Exxon prior to November 1990?

Yes __ No__ [ILLEGIBLE]

8.a. Did the Dealers prove by clear and convincing evidence that they relied upon alleged false statements by Exxon, and that such reliance was the direct cause of their failure to file this lawsuit sooner than May 1991?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 9. IF YOU ANSWEWRED [sic] "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 8.b.

8.b. Did the Dealers prove by a preponderance of the evidence that they relied upon alleged false statements by Exxon, and that such reliance was the direct cause of their failure to file this lawsuit sooner than May 1991?

Yes __ No__ [ILLEGIBLE]

9. When did the Dealers learn, or when did their representatives have, sufficient facts to raise a suspicion and a duty to investigate, that they had a claim against Exxon?

State date Nov-1990

SO SAY WE ALL.

/s/ Allen Briggs
FOREPERSON

DATE: 2-20-2001

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Sep. 18, 2000]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER ON MOTION TO DISCHARGE CLASS AND ON DEALER RENT

THIS MATTER is before the Court on Defendant, Exxon Corporation's Motion to Decertify the Class [D.E. # 1293] and its Motion In Limine To Exclude Evidence Regarding Dealer Rent [D.E. # 1253]. A hearing was held on both motions on Friday, September 15, 2000. At that same time, the Court heard further argument in response to its *sua sponte* order concerning subject matter jurisdiction. Based on the memoranda of law filed by the parties, and the arguments presented, it is hereby ORDERED as follows:

1. Exxon Corporation's motion to decertify the class for Count 1 of the Amended Complaint is DENIED. The class was certified pursuant to Judge Kehoe's prior order [D.E. # 912]. Thereafter, Exxon Corporation sought mandamus in the Eleventh Circuit Court of Appeals to decertify the class. Mandamus was rejected. The Court then held an extensive *Daubert* hearing which was followed by a jury trial where Plaintiffs submitted further evidence supporting proof of common issues of fact and law pertaining to class-wide duty,

breach and damages. A number of the common legal issues have already been addressed by orders of the court. Exxon now claims that the recent Eleventh Circuit decision in *Rutstein v. Avis Rent-A-Car System, Inc.*, 211 F.3d 1228 (11th Cir. 2000) requires a different decision. Upon further review, the Court disagrees that *Rutstein* requires decertification. To the contrary, based on the unique facts and law of this case relating to duty, breach and damages, the Court continues to conclude that class action is appropriate, that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. Exxon's Motion in Limine to exclude from the trial evidence regarding the rent paid by Exxon dealers is DENIED. The Court continued to find such evidence relevant to the issues raised by the pleading. Under a Rule 403 analysis, the probative value of the evidence is not outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. The Court's *Sua Sponte* Order relating to subject matter jurisdiction is discharged, and the earlier order on the matter [D.E. # 1122] is reconfirmed.

ORDERED this 18th day of September, 2000.

/s/ [illegible]
ALAN S. GOLD
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jan. 11, 2000]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

SUA SPONTE ORDER REGARDING SUBJECT MATTER JURISDICTION

By order dated July 1, 1999, the court granted Plaintiffs' motion for partial summary judgment regarding subject matter jurisdiction [D.E. # 1133]. In that order, I indicated that the Eleventh Circuit had not yet ruled on the issue of whether section 1367 had overruled *Zahn v. International Paper Co.*, 94 S.Ct. 505 (1973). While not directly answering this issue, the Eleventh Circuit in *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792 (11th Cir. 1999), did consider whether, in a class action, a potential attorneys' fee awarded out of a common fund may count in the aggregate toward the jurisdictional minimum necessary to establish diversity jurisdiction. In its analysis, the appellate court commented that: "Because the district court found fraudulent joinder, and the plaintiffs dismissed the only nondiverse party, the only issue here is whether the amount in controversy is more than $75,000. And that issue is further

narrowed because plaintiff seeks no more than $75,000, *and the compensatory damage claims of individual class members may not be aggregated to satisfy that amount. See Zahn International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 39 L.Ed.2d 511 (1973)(emphasis added).

In light of the *Davis* case, the court requests additional argument from the parties as to whether, by relying on *Zahn*, the Eleventh Circuit implicitly has ruled on its continued validity in a manner which binds the district court in this case. For scheduling purposes, Plaintiffs shall submit their brief within 30 days, followed by 30 days for the Defendant's response, and an additional 15 days for any reply.

ORDERED this 7 day of January, 2000.

/s/ Alan S. Gold
ALAN S. GOLD
United States District Court

APPENDIX I

UNITED STATES DISTRICT COURT,
S.D. FLORIDA, MIAMI DIVISION.

No. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

Aug. 10, 1999

FINAL ORDER REGARDING EXXON'S AFFIRMATIVE DEFENSES AND PLAINTIFFS' ENTITLEMENT TO PREJUDGMENT INTEREST

GOLD, *District Judge*.

THIS CAUSE is before the Court *sua sponte*.[1] In response to Plaintiffs' cause of action for breach of contract, Exxon

[1] The Court has continued to exercise its pretrial duty to delineate and narrow the issues for trial and to eliminate improper issues. *See Johnson Enterprises, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1332-22 (11th Cir.1998). By prior orders, the late Judge Kehoe had denied Exxon's motions for summary judgment based on the grounds of: (1) statute of limitations [D.E. # 907]; and (2) release [D.E. # 911]. Since the issuance of the orders on summary judgment, the parties have focused on various other aspects of the case. However, in its pretrial orders, the Court has required the parties to further brief the defense issues. This Order endeavors to rule on the defense related issues and establish a procedure for post verdict procedures.

raised two affirmative defenses,[2] which, it contends, precludes a finding of liability as to, at least some of, Plaintiffs' claims: (1) the statutes of limitations in the various jurisdictions bar Plaintiffs' action as untimely;[3] and (2) releases affecting in excess of 5,000 dealer-members preclude the instant claim for breach of contract. Exxon additionally argues that Plaintiffs' attempt at avoiding these affirmative defenses by alleging fraudulent concealment cannot be adjudicated on a class-wide basis, but must be resolved in thousands of separate post verdict jury trials.[4] According to Exxon, a number of jurisdictions require Plaintiffs to prove the element of reliance in order to prevail on the fraudulent concealment claim, and, to the extent Plaintiffs are allowed to assert an avoidance, individualized issues of proof preclude resolution on a class-wide basis. Exxon also contends that some of the jurisdictions require Plaintiffs' fraudulent concealment claim to be proven by clear and convincing evidence, while others require only the standard civil burden of proof by a preponderance of the evidence. Exxon urges the Court to resolve its affirmative defenses on an individual basis, because class treatment in light of the

[2] By order issued April 21, 1998, Judge Kehoe denied Exxon's motion for partial summary judgment on the grounds of superseding contract [D.E. # 910]. Exxon has not included this ground in its statement of defenses for jury trial purposes. *See* Exxon's Response to Order on Status Conference [D.E. # 984] and its Supplemental Submission Regarding Affirmative Defenses [D.E. # 1149].

[3] Plaintiffs did not file this case until May 13, 1991. Exxon contends that dealer claims in thirty of the thirty-five states are time-barred for purchases before May 13, 1987.

[4] Exxon contends that: "With respect to those plaintiff's claims that are subject to an affirmative defense, separate proceedings for each plaintiff will be required to either allow the particular dealer to seek to 'avoid' the statutes of limitations or determine the intent of the parties to a release." Supplemental Submission of Defendant Exxon Corporation Regarding Affirmative Defense [D.E. # 1149], at 14.

jurisdictional variances would deprive Exxon of its right to meaningfully defend its position.

In contrast, although conceding that some jurisdictional differences exist, Plaintiffs contend that class-wide treatment of the common issues is appropriate. Plaintiffs aver that the common issues involved in their breach of contract claims out-number the differences; therefore, Plaintiffs should not be burdened at this stage of the proceedings with having to bring separate claims by the individual dealers. Plaintiffs have suggested alternatives to Exxon's decertification of the various issues, many utilized by courts which have previously addressed this situation.

The Court has reviewed the respective positions and arguments of the parties. Having considered the parties' concerns in light of the procedural history of this case and having conducted its own search of the law applicable in the relevant jurisdictions, the Court concludes that Plaintiffs' cause of action for breach of contract shall proceed on a class-wide basis in accordance with the following analysis and contingencies.

DISCUSSION AND ANALYSIS

As a threshold matter, the Court recognizes the policies and principles which underlie the Uniform Commercial Code (the "UCC"). Drafted under the joint sponsorship of the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws, the purpose of the UCC, including Article 2 thereof, is to "simplify, clarify and modernize the law governing commercial transactions" and "to *make uniform the law among the various jurisdictions.*" UCC § 1-102(2) (emphasis added). Except for Louisiana, all states have codified the pertinent sections of the UCC regarding the sale of goods. *See Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1142 (5th Cir.1986). Although some variance exists, it appears that the

differences are minor and do not contravene the purpose, as stated by the drafters of the UCC.

Statute of Limitations in Contracts for Sale

Article 2 of the UCC also provides procedural uniformity for bringing actions predicated on contractual relationships. *See* UCC § 2-725.[5] The ALI's version, as well as those of most of the states, include an "official comment," announcing their purpose in adopting "a uniform statute of limitations for sales contracts":

> eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation

[5] The ALI version of UCC § 2-725 [statute of limitations in contracts for sale] provides:

> 1. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> 2. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> 3. Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> 4. This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Article becomes effective.

depending upon the state in which the transaction occurred.

UCC § 2-725, cmt. Although most states have adhered to the four-year limitations period for actions on a contract for goods, a few states have opted for longer periods, while one state codified a shorter time in which to file contract claims.[6] Florida repealed its correlative UCC statute of limitations, requiring compliance with its general statute of limitations, under which actions on a contract are barred after the expiration of five years from the date the cause of action accrued. *See* Fla.Stat.Ann. § 95.11(2)(b).

Nearly all of the states have adopted language mirroring that of UCC § 2-725(4) drafted by the ALI. While discounting an aggrieved party's lack of knowledge of its cause of action as a basis for tolling or extending the statutory period, sometimes referred to as the "discovery rule," the subsection provides that it was not intended to "alter the law on tolling of the statute of limitations." UCC § 2-725(4).[7]

[6] Of the jurisdictions relevant to this action, Mississippi and South Carolina opted for a six-year statute of limitations on breach of contract and warranty claims. *See* Miss.Code Ann. § 75-2-725; S.C.Code Ann. § 36-2-725. In Colorado, claims on contracts for the sale of goods are barred after three years. *See* Colo.Rev.Stat.Ann. §§ 4-2-725, 13-80-101.

[7] Under the UCC, the discovery rule can toll the statute of limitations on actions for breach of warranties under certain circumstances. *See* UCC § 2-725(2).

The Ohio Exception

Ohio is an exception to this general rule.[8] Ohio's "savings clause" identifies the activity necessary to toll the statute, specifying that: "This section does not alter sections 2305.15 and 2305.16 of the Revised Code on tolling of the statute of limitations." Ohio Rev.Code Ann. § 1302.98(D). Having qualified its limitations period for actions arising from contracts on goods, the statute may be tolled only if: (1) the defendant "is out of the state, has absconded, or conceals *himself*"; or (2) the action against whom the cause of action is directed is disabled, due to either minority status or mental incompetence. *Id.* §§ 2305.15, 2305.16 (emphasis added). Since neither of these contingencies are present in the instant action, the four-year statute of limitations bars recovery of damages for the claims of Ohio Plaintiffs which accrued prior to May 13, 1987. This does not, however, preclude these Plaintiffs from recovering damages for Exxon's alleged breaches which occurred subsequent to that date.

The Florida Exception

Analysis under Florida law is similarly unique, and adversely impacts on the recovery of damages for claims of Florida Plaintiffs that accrued prior to May 13, 1986. According to recent case law construing Florida's statute of limitations, Florida recognizes neither the discovery rule nor fraudulent concealment as vehicles for tolling the five-year

[8] Plaintiffs have argued to the contrary, citing *Standard Alliance Indus. Inc. v. Black Clawson Co.*, 587 F.2d 813, 820-23 (6th Cir.1978). However, in that case, the court was deciding an action brought for breach of an express warranty and noted that the discovery rule within Ohio Rev.Code § 1302.98(2) applied to toll the statute of limitations. The relevant section of the Ohio Revised Code, § 1302.98, became effective as of July 1, 1962. Therefore, at all relevant times— throughout the Discount for Cash period—the doctrine of fraudulent concealment could not toll the running of the statute of limitations for a breach of contract action predicated on the sale of goods.

limitations period for actions predicated on obligations imposed under a written instrument or contract. *See Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir.1999) (quoting *Federal Ins. Co. v. Southwest Fla. Retirement Ctr., Inc.*, 707 So.2d 1119, 1122 (Fla.1998)); *Fulton County Admin. v. Sullivan*, 22 Fla.L. Weekly S578, 1997 WL 589312 (Fla. Sept. 25, 1997) (absent an expression of the Legislature that fraudulent concealment may act to toll the statute of limitations, courts are constrained to honor the statutory bar except for those circumstances enumerated in § 95.051).[9]

Contingencies for Tolling the Statutes of Limitations

As previously articulated, except for Florida and Ohio,[10] the uniform statute of limitations does not preempt the states'

[9] Plaintiffs direct the Court's attention to the fact that *Sullivan*, an unpublished opinion of the Florida Supreme Court, is currently pending rehearing. *See Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532, 533 n. 8 (Fla. 4th DCA 1999). Therefore, Plaintiffs argue, that avoidance based on fraudulent concealment is unclear in Florida. However, *Sullivan* has since been cited with approval by the Florida Supreme Court. *See Federal Ins. Co. v. Southwest Fla. Retirement Center, Inc.*, 707 So.2d 1119, 1122 (Fla.1998). In turn, that case has been cited and relied upon by the Eleventh Circuit Court of Appeals. *See Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913 (11th Cir.1999). Accordingly, *Sullivan* is binding on this Court at this time.

[10] Exxon maintains that New York is also an exception to the general rule that fraudulent concealment, if proven, tolls the statute of limitations for contract actions. However, research conducted by the Court reveals that New York does permit avoidance of a statute of limitations affirmative defense. *See, e.g., Cerulean Land Developers Corp. v. Colon Development Corp.*, 144 A.D.2d 615, 535 N.Y.S.2d 35, 37-38 (N.Y.App.Div.1988); *see also Buttry v. General Signal Corp.*, 68 F.3d 1488, 1493 (2d Cir.1995); *Salinger v. Projectavision, Inc.*, 972 F.Supp. 222, 232 (S.D.N.Y.1997); *Netzer v. Continuity Graphic Assoc., Inc.*, 963 F.Supp. 1308, 1316 (S.D.N.Y.1997); *Union Carbide Corp. v. Montell N.V.*, 944 F.Supp. 1119, 1139 (S.D.N.Y.1996); *Johnson v. Nyack Hosp.*, 891 F.Supp. 155, 165 (S.D.N.Y.1995).

laws on tolling the limitations period. *See* UCC § 2-725(4). To preclude the harsh effects of their statute of limitations, several states recognize acts perpetrated by a defendant for which the defendant is estopped from using the statute of limitations as a bar to a suit for liability. *See, e.g., First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So.2d 727, 730 (Ala.1981) ("Tolling the statute of limitations in favor of the plaintiffs is not inconsistent with the function of the statute . . . [which is to] prevent revival of fraudulent or stale claims and prevent surprise after evidence is lost or obscured.") (citing U.S. Supreme Court precedent). Thus, the propriety of tolling the statute of limitations is based on equitable principles which underlie the laws of the respective states. *See Jafay v. Board of County Comm'rs of Boulder County*, 848 P.2d 892, 903 (Colo.1993) (when a rigid application of the statute of limitations leads to an unjust result, courts may properly fashion an equitable exception to the limitations period); *see also Dean Witter Reynolds, Inc. v. Hartman* 911 P.2d 1094, 1096 (Colo.1996) ("equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice"); *Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 466 P.2d 736, 738 (1970) ("The policy underlying the statute of limitations is primarily for the protection of the defendant, and the courts, from litigation of stale claims *where plaintiffs have slept on their rights* and evidence may have been lost or witnesses' memories faded. This policy is sound and necessary for the orderly administration of justice.") (emphasis added). These equitable principles remove the statutory bar for conduct that includes, but is not limited to, fraudulent concealment of the wrongful conduct and the concept of continuing breach. *See, e.g., Duell v. United Bank of Pueblo, N.A.*, 892 P.2d 336, 341 (Colo.Ct.App.1994) (where a defendant's wrongful actions have been the cause of a plaintiff's failure to institute a timely

action, the defendant may be estopped from relying upon the resulting delay as a defense to the plaintiff's claim).

To avoid the statutory bar, Plaintiffs have alleged that Exxon fraudulently concealed the Plaintiffs' cause of action. Based on its review, the Court concludes that thirty-three of the thirty-five jurisdictions involved recognize the doctrine of fraudulent concealment as an avoidance to the statute of limitations.[11] Of these jurisdictions, twenty-nine states require Plaintiffs to prove the elements of fraudulent concealment by a preponderance of the evidence, whereas six states require Plaintiffs to establish fraudulent concealment by clear and convincing evidence. The elements of fraudulent concealment vary to some degree among the jurisdictions. From Exxon's prospective, *each plaintiff* has the burden of proving each one of the elements.[12] For reasons discussed more fully below, the Court respectfully disagrees, and concludes that the factual disputes arising from the fraudulent concealment doctrine can be properly resolved on a class-wide basis by the jury in deciding the remaining class-wide issues, notwithstanding slight variations in state law as to how certain of the elements are described.

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[11] As will be discussed, the Court has found that, of the thirty-six jurisdictions involved, since there is no issue as to the statute of limitations with regard to Louisiana Plaintiffs, only thirty-five jurisdictions were relevant to the analysis. Additionally, of these thirty-five jurisdictions, Florida and Ohio are exceptions to the general rule. *See* discussions *supra*, at p. 672, and *infra*, nn. 15 & 16.

[12] Exxon contends that each Plaintiff has the burden of proving that: (1) Exxon committed affirmative acts intended to conceal its alleged failure to file suit until May 13, 1991; (2) the individual dealer reasonably relied on those acts in deciding not to file suit until May 13, 1991; (3) the individual dealer exercised due diligence in investigating or trying to uncover the possible existence of a claim; and (4) the individual dealer did not know or suspect the concealed facts underlying his cause of action. *See* Supplemental Submission of Defendant Exxon Corporation Regarding Affirmative Defenses, at 4.

A claim or defense can implicate common issues and be litigated collectively, despite the existence of state law variations, so long as the elements of the claim or defense are substantially similar and any differences fall into a limited number of predictable patterns which can be readily handled by special interrogatories or special verdict forms. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.* 962 F.Supp. 450, 525 (D.N.J.1997) ("a manageable number of jury instructions could be fashioned to comport with the elements of the common law claims in the many jurisdictions.").

While Exxon contends that Plaintiffs' fraudulent concealment avoidance in this case presents individual issues because of variations of state law in the thirty-three relevant jurisdiction, a number of federal courts considering such matters have determined that the fraudulent concealment doctrine presents common issues capable of being litigated collectively in the class context. *See Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.1975) ("The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the common 'question' requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit."). The commonality requirement is satisfied when the alleged misrepresentations constitute a "common course of conduct," even if the statements made to each Plaintiff were not identical.[13] *See Kirkpatrick v. J.C. Bradford & Co.*,

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[13] To allege a "common course of conduct," Plaintiffs must allege in detail the specific misrepresentation and "identify or isolate any particular misstatement or omission contained in a document and contained in a

827 F.2d 718, 724-25 (11th Cir.1987); *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y.1988); *In re Victor Tech. Sec. Litig.*, 102 F.R.D. 53, 56 (N.D.Cal.1984). "[A]lthough the communications to [the Plaintiff-Class] may not have been uniform, they allegedly were uniformly misleading. [Any] variations are therefore immaterial" and cannot defeat class treatment. *Bresson*, 118 F.R.D. at 343.

While oral misrepresentations have been held to be insufficiently similar to warrant class certification, written misrepresentations disseminated to all class members have often been found sufficiently similar. *Compare Kaser v. Swann*, 141 F.R.D. 337, 339 (M.D.Fla.1991) *with Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 679 (N.D.Ill.1989). Many cases predicated on securities violations have been certified as class actions with regard to pendent state law fraud claims. *See, e.g., In re Southeast Hotel Properties Ltd. Partnership Investor Litig.*, 151 F.R.D. 597 (W.D.N.C.1993); *In re Seagate Tech. Sec. Litig.*, 115 F.R.D. 264 (N.D.Cal.1987); *In re ORFA Sec. Litig.*, 654 F.Supp. 1449 (D.N.J.1987); *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F.Supp. 718 (E.D.N.Y.1986).

Courts have also found that where there is a "common legal grievance," shared by the members of the class, "the benefit from the determination in a class action of the existence of a . . . common pattern of fraud outweighs the problems of individual actions involving such other issues as causation, reliance, and damages." *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736, 745-47 (1983). Where plaintiffs in a class action allege similar representations, the reliance issues may be presumed similar as well. *See Town of New Castle v. Yonkers Contracting Co.*,

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subsequent document which most of the other class members received." *See Blumenthal v. Great American Mortgage Investors*, 74 F.R.D. 508, 513 (N.D.Ga.1976) (citation omitted).

Inc., 131 F.R.D. 38, 43 (S.D.N.Y.1990) (common questions pervade fraudulent concealment inquiry); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 579 (E.D.Pa.1984) (same); *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 55 (D.Mass.1981) (same): *In re Independent Gasoline Antitrust Litig.*, 79 F.R.D. 552, 559 (D.Md.1978) (same); *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 843 (Tex.Ct.App.-Houst.1996). Consequently, courts have permitted actions for fraudulent concealment to proceed as a nationwide class if:

> convinced that individual actions by claimants would impose a strangling harness on the judiciary, as well as the parties. . . . [and] [s]eparate actions would produce considerable duplication of effort, increase the cost of litigation, create the risk of inconsistent results for parties who are similarly situated, and consume judicial resources to wasteful levels (through duplication) throughout the country.

In re Catfish Antitrust Litig., 826 F.Supp. 1019, 1045 (N.D.Miss.1993).

Here, the common questions arising from an assertion of the fraudulent concealment doctrine are: (1) Whether Exxon affirmatively concealed its breach from the dealer network; and (2) Whether the Dealer-Class, by exercising due diligence, could have determined that a breach occurred.[14] Both the evidence of Exxon's acts of concealment

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[14] According to Plaintiffs, Exxon accomplished this concealment by repeatedly assuring Plaintiffs that Exxon was adhering to its promise of offsetting its wholesale price for fuel to Plaintiffs by an amount that was equal, "on average," to the 3% credit card processing charge first assessed in August 1981. Because the cost of fuel is volatile and any proof that the offset was not implemented was contained in proprietary documents maintained exclusively by Exxon, Plaintiffs were forced to rely on Exxon's assurances of contractual performance. Plaintiffs, although suspicious that Exxon was performing as promised, did not realize a breach had occurred until 1991, when an Exxon official purportedly represented that Exxon had failed to continue, but would resume, applying

and the circumstances that would have triggered Plaintiffs' duty of due diligence would be common to the class. *See id.* at 1044.

Nevertheless, Exxon argues that the diversity among the jurisdictions regarding the elements necessary for establishing fraudulent concealment and the discrepancies in the burdens of proof require individual judicial attention. Thus, proof of the viability of Plaintiffs' avoidance is not conducive to class-wide management.

The Court is unpersuaded by Exxon's position that class-wide treatment of the relevant issues, which predominate, is inappropriate. In light of the overwhelming commonality and typicality of the issues and equitable concerns, the Court cannot "permit [Exxon] to contest the liability with each claimant in a single separate suit, [which] would, in many cases give [Exxon] an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what . . . the class suit practice was to prevent." *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir.1941); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").[15]

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the offset. Immediately upon this revelation, Plaintiffs filed their breach of contract suit.

[15] Exxon also argues that a single jury cannot address the claims of Florida and Ohio Plaintiffs, where fraudulent concealment cannot avoid a statute of limitations affirmative defense, in tandem with claims of Plaintiffs permitted to assert fraudulent concealment. However, the Court disagrees with Exxon's assessment and is not persuaded by the authorities cited by Exxon in support. *Bruton v. United States*, 391 U.S. 123, 125, 88 S.Ct. 1620, 1622, 20 L.Ed.2d 476 (1968), was a criminal case wherein the Supreme Court was dealing with prejudicial testimony of a co-

Fraudulent Concealment Avoids Statutory Time Bar

Although some jurisdictional differences exist as to elements necessary to establish a claim of fraudulent concealment that avoids an affirmative pleading of a statute of limitations, the differences are not insurmountable so as to require decertification of the issue. In fact, jurisdictions which recognize fraudulent concealment fall into only two categories: those that require proof of reliance and those that do not.

Of the relevant jurisdictions surveyed, the Court found that eleven of the thirty-three jurisdictions that permit tolling of the statute of limitations for fraudulent concealment contain a reliance element [16]: California, Colorado, Maine, Maryland,

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conspirator. In *Wilson v. Gillis Advertising Co.*, 145 F.R.D. 578, 582 (N.D.Ala.1993), the evidence precluded related to the net worth of the defendant, which the court found would improperly impact on the issue of the amount and propriety of awarding punitive damages. Here, there is no prejudice, because the Florida and Ohio Plaintiffs cannot avoid the statutory time-bar on grounds of fraudulent concealment. These Plaintiffs would "fall out" of the issue *if* the jury decides fraudulent concealment was practiced by Exxon. In other words, Florida and Ohio Plaintiffs cannot recover beyond the statutory period and will not benefit by a class-wide determination of fraudulent concealment. Conversely, Plaintiffs in the remaining jurisdictions will not be advantaged, because Plaintiffs from Florida and Ohio will be precluded from offering evidence substantiating fraudulent concealment.

[16] Although Florida requires reliance be proven to prevail on a fraudulent concealment claim, such a claim cannot toll the statute of limitations. *See Sullivan*, 1997 WL 589312, at *2-3. Likewise, reliance is required for fraudulent concealment in Ohio, but its statute of limitations for contracts for goods does not provide tolling for fraudulent concealment. *See* Ohio Rev.Code Ann. § 1302.98. Moreover, while reliance is a prerequisite for proving fraudulent concealment under Louisiana law, Louisiana's statute of limitations for contract actions is ten years, negating the need to either plead or prove fraudulent concealment as to those Plaintiffs, since this action was filed within the ten-year time-frame. *See* La.Civ.Code Ann. art. 3499.

Montana, New Mexico, New York, South Carolina, Texas, Virginia, and Washington. *See Community Cause v. Boatwright*, 124 Cal.App.3d 888, 177 Cal.Rptr. 657, 664 (Cal.Ct.App.1981); *Kopeikin v. Merchants Mortgage & Trust Corp.*, 679 P.2d 599, 602 (Colo.1984); *Harkness v. Fitzgerald*, 701 A.2d 370, 372 (Me.1997); *Edwards v. Demedis*, 118 Md.App. 541, 703 A.2d 240, 251 (1997); *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 626 P.2d 822, 827 (1981); *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 858 P.2d 66, 74 (1993); *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995); *Strong v. University of So. Carolina Sch. of Medicine*, 316 S.C. 189, 447 S.E.2d 850, 852 (1994); *Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex.Ct.App.-Dallas1991); *Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 437 S.E.2d 189, 193-94 (1993); *Crisman v. Crisman*, 85 Wash.App. 15, 931 P.2d 163, 166 (1997). The remaining jurisdictions require only proof of an affirmative act of concealment, while some jurisdictions also require a showing that the plaintiff was reasonably diligent in detecting the wrongful activity which gives rise to the cause of action. *See, e.g., Colonia Ins. Co. v. City National Bank*, 13 F.Supp.2d 891, 900 (W.D.Ark.1998); *Resource Ventures, Inc. v. Resources Management Int'l, Inc.*, 42 F.Supp.2d 423, 436 (D.Del.1999); *Richards v. Mileski*, 662 F.2d 65, 70-71 (D.C.Cir.1981); *Jim Walter Corp. v. Ward*, 245 Ga. 355, 265 S.E.2d 7, 9 (1980); *Ludwig v. Ford Motor Co.*, 510 N.E.2d 691, 697 (Ind.Ct.App.1987); *Cunningham v. Massachusetts Mut. Life Ins. Co.*, 972 F.Supp. 1053, 1054 (N.D.Miss.1997); *Foodtown v. Sigma Marketing Sys., Inc.*, 518 F.Supp. 485, 488 (D.N.J.1980); *Beauty Time, Inc. v. VU Skin Sys., Inc.*, 118 F.3d 140, 144 (3d Cir.1997); *Dean Witter Reynolds, Inc. v. McCoy*, 853 F.Supp. 1023, 1036 (E.D.Tenn.1994). Due diligence is a question of fact within the province of the jury's responsibilities. *See, e.g., Texas v. Allan Const. Co.,*

Inc., 851 F.2d 1526, 1533 (5th Cir.1988); *Bradley v. Maryland Cas. Co.*, 563 F.Supp. 602, 607-08 (D.Del.1983).

As to those jurisdictions that require reliance, the essential issue is whether, under the circumstances of this class action, reliance on Exxon's purported deceit can be established on a class-wide basis. Considering the circumstances, the Court concludes that it can.

Several courts have found that the requirement that reliance must be justified in order to support recovery may be shown on a class basis. For instance, federal class action cases in which stockholders have alleged fraud on the basis of printed misrepresentations in a corporation's prospectus hold that individual proof may not be required to establish reliance by each stockholder. *See, e.g., Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir.1968).[17]

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[17] Other cases in which class treatment of reliance has been held viable include the following: In consolidated actions against an automobile manufacturer that allegedly fraudulently induced purchasers to buy vehicles with a known design defect, the court properly certified the statewide class of approximately 7,500 purchasers where the purchasers' causes of action embraced common legal and factual elements and where benefit from determining the existence of a common defect and common pattern of fraud outweighed problems of individual actions involving other issues such as causation, reliance, and damages. *See In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (1983); in an action based upon an alleged breach of a retail installment sales contract for the purchase of a vacuum cleaner, the defendant was entitled to convert her counterclaim alleging fraud into a class action on behalf of all similarly situated purchasers of vacuum cleaners from the plaintiff, provided all prerequisites for class action status were met. Establishment of a common course of conduct by salesmen pursuant to training or "canned" techniques taught by the plaintiff would be a "common strand of misrepresentation" running through all the sales, sufficient to warrant granting class action status. *See Compact Electra Corp. v. Paul*, 93 Misc.2d 807, 403 N.Y.S.2d 611 (N.Y.Sup.App.1977); where a small number of purchasers had attempted to bring a class action claiming that the defendant vendor had falsely represented to them and others that if

The essential class-wide reliance issue for the jury is whether the Plaintiff-Class, through representatives, relied upon false representations by Exxon in delaying the filing of an action within the limitations periods. Evidence of such reliance may be proven by direct or circumstantial evidence. *See, e.g., Blackie*, 524 F.2d at 902 (Ninth Circuit citing several jurisdictions in the Second, Ninth, and Tenth Circuits); *see also Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 626 P.2d 822, 827 (1981) ("An inference of reliance upon fraudulent representations may be drawn from circumstances surrounding the transaction which have been proven."); *Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D.Conn.1982).[18] Moreover, "where there is [proof of] active

they made purchases of frozen food at half price for two years, they would each be given a freezer without cost, the court in held that, since the class was described as including persons who were tricked, deceived, and misled into believing that they would get a freezer without charge if they would buy frozen food at one-half the price, it would be difficult to imagine one member of the class electing to pay out his contract to the last penny. Even if one such person were found, stated the court, he would not be a part of the class represented by those whose names appeared in the caption of the complaint. *See Robnet v. Miller*, 105 Ohio App. 536, 152 N.E.2d 763 (1957); a class action was properly brought by car purchasers against a manufacturer for fraud and misrepresentation in advertising and selling Oldsmobile automobiles with engines manufactured by Chevrolet. Each class member did not have to prove exposure to advertising as the advertising was conducted through the mass media; nor did each class member have to prove reliance on the advertising if the class representative presented sufficient evidence to raise a presumption affecting the burden of going forward with evidence that all class members relied on the advertising. *See Amato v. General Motors Corp.*, 11 Ohio App.3d 124, 463 N.E.2d 625 (1982).

[18] Although Exxon "must be given fair opportunity to contest the validity of individual claims and to present defenses unique to particular claims.... At the same time, consistent with judicial economy and access to judicial relief objections to class actions, 'class members should be able to secure the relief to which they are entitled without expending more money and effort than is necessary.' " *Newberg on Class Actions* § 9.63, at 9-172 (3d ed.1992) (quoting source omitted).

concealment, Plaintiffs' due diligence is irrelevant." *Township of Susquehanna v. H & M, Inc.*, 98 F.R.D. 658, 668 (M.D.Pa.1983) (citing *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F.Supp. 402, 406-07 (D.Colo.1979)).[19]

Exxon proffers no evidence or argument which purports to demonstrate that access to information and data substantiating a cause of action for breach of Exxon's promise to offset the credit card processing fee were available to some, but not all, of the dealers. To the contrary, the evidence proffered has been that Exxon continuously assured Plaintiffs that the offset was being applied "on average" to all of Exxon's dealers. Exxon admitted as much in deposition testimony of its executive officers: The question of whether the offset was being applied was raised by the dealer representatives every time Exxon addressed its dealers at national conferences, and every time the dealer representatives were told that the offset was in force. *See* Deposition of Voller, at 304-05. Whether these dealer representatives reported this information to those they represented and whether this information was disseminated raises questions of fact to be proved or disproved, and subsequently, decided by the jury.

As the case law instructs, Plaintiffs will bear the burden of proving fraudulent concealment, either by clear and convincing evidence or by a preponderance thereof. Depending on whether an individual jurisdiction requires that reliance be proven to support the claim, the reliance element may not be altogether eliminated. *See Waters v. International*

[19] The Court notes that some courts have reached contrary determinations. *See, e.g., Wolfson v. Artisans Savings Bank*, 83 F.R.D. 547, 551-52 (D.Del.1979) (limiting certified class to exclude members seeking to avoid a statute of limitations bar by asserting fraudulent concealment); *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp.*, 62 F.R.D. 381, 390 (S.D.Ohio1973) ("the questions of exercise of due diligence and success of concealment would have to be answered on an individual basis for each class member.").

Precious Metals Corp., 172 F.R.D. 479, 485-86 (S.D.Fla.1996) (in cases where "a course of business or a device, scheme or artifice operates as a fraud, as long as the plaintiffs are able to prove the materiality of the omitted facts, proof of reliance is not prerequisite to recovery.").[20]

Correlatively, Exxon is entitled to rebut the reliance element. Although Exxon does not have "an unequivocal right to rebut the presumption of reliance on an individual basis," and its substantive trial rights will not suffer prejudice by placing limitations upon the amount of proof it may present, *id.* at 486, Exxon shall be given the opportunity to establish that any "misrepresentations in fact" did not induce a delay in filing a cause of action until after the statutes of limitations had run, or that dealers would not have filed a cause of action even if possessed with the knowledge that Exxon did not perform its promised contractual obligation. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 248, 108 S.Ct. 978, 992, 99 L.Ed.2d 194 (1988). With this assumably disputed evidence, the parties may argue to the jury whether Plaintiffs met their respective burdens and whether the claim was successfully rebutted by Exxon.

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[20] As Plaintiffs assert, the Court may instruct a single jury as to the different burdens of proof applicable to fraudulent concealment. Such a practice will not be confusing or difficult. *See* Discussion at pp. 678-79, *infra*; *see also Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 609 (1st Cir.1985) ("The district court carefully and correctly explained the burden of proof applicable to the statutes and written interrogatories were submitted to the jury for findings on each of the three statutes. We think that the instructions, to which there were no objections, were sufficient to enable the jury to cope with the different burdens of proof and apply them correctly."); *Bonilla v. Liquilux Gas Corp.*, 812 F.Supp. 286, 293 (D.P.R.1993) ("we find that the issue of different burdens of proof can be dealt with in the judge's instructions to the jury and need not lead to confusion.").

Statutes of Limitations Are Not a Complete Bar to Recovery

Even if the jury finds that fraudulent concealment was not proven, either by clear and convincing or a preponderance of evidence, Plaintiffs are not totally barred from recovering under their contract claims. Rather, the statute of limitations will only affect the extent to which respective Plaintiffs may recover. In other words, should the jury find that fraudulent concealment did not apply, then, depending on jurisdictional constraints, some class Plaintiffs' claims will be time-barred after either 1988, 1987, 1986, or 1985. However, Exxon has not, and indeed cannot, argue that any Plaintiffs are completely barred by any relevant statute of limitation.

Differing Burdens of Proof Do Not Preclude Class-Wide Adjudication

The parties disagree as to which burden of proof for claims of fraudulent concealment is applicable in the relevant jurisdictions. They agree that state law requires proof by clear and convincing evidence in at least four states: Connecticut, Maryland, Pennsylvania, and Virginia. However, Exxon contends that twelve other states adhere to this heightened burden of proving fraudulent conduct.

The Court has reviewed the cases cited by Exxon in the twelve disputed jurisdictions. In two of these jurisdictions, the Court agrees the exacting standard of clear, unequivocal, and convincing evidence is necessary to prevail on a claim of fraudulent concealment: Vermont and Washington. *See Hughes v. Holt*, 140 Vt. 38, 435 A.2d 687, 689 (1981); *Crisman v. Crisman*, 85 Wash.App. 15, 931 P.2d 163, 166 (1997). However, case law in the remaining jurisdictions illustrate no definitive inclination to subject Plaintiffs' avoidance of Exxon's statute of limitations affirmative defense based on claims of fraudulent *concealment* to a heightened standard of proof. In the absence of clear and convincing guidance from the respective state's courts, this

Court will not imply a standard for proving fraudulent concealment other than by a preponderance of the evidence.[21] Accordingly, Plaintiffs will be required to prove fraudulent concealment by clear and convincing evidence for their breach of contract claims governed by the law of the following jurisdictions: Connecticut, Maryland, Pennsylvania, Vermont, Virginia, and Washington.

As with Exxon's argument regarding decertification due to certain jurisdictional requirements for proving the element of reliance, the dichotomy created by the differing burdens does not create an insurmountable impediment to proceeding to trial as a class. To the contrary, although "application of the laws of multiple states to a common set of claims certainly has potential complexities, [ ] on analysis, procedures and litigation devices are available, in common usage, to render these tasks manifestly manageable for the court, the jury, and all the parties." *Newberg on Class Actions* § 9.68, at 9-184. These methods include carefully crafted jury instructions and special verdict forms. *See id.*

In the instant action, the discrepancy between the two standards of proof are amenable to the issue-structuring devices afforded by jury instructions and special verdict forms. For instance, a showing of fraudulent concealment by clear and convincing evidence necessarily satisfies the lesser burden of proof by a preponderance of the evidence. Should the jury find, through directives on the verdict form, that the evidence clearly and convincingly supports Plaintiffs' avoidance claim of fraudulent concealment, then the issue is resolved. On the other hand, should the jury determine that fraudulent concealment has not been clearly and convincingly

[21] Generally, unless stated otherwise, the burden of proof in civil trials is by a preponderance of evidence. *See, e.g., Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 108 (D.Colo.1996) ("The burden of proof under which a trial is governed is 'preponderance of the evidence.' ").

proven, then Plaintiffs in the six enumerated jurisdictions will be barred from recovery on contractual damages which predated the applicable limitations periods. At that point, the jury will need to evaluate the evidence of fraudulent concealment pursuant to the preponderance of evidence standard. Should the jury find that the evidence satisfies this lesser standard, those Plaintiffs may recover from the time Exxon allegedly breached the Sales Agreements, regardless of the limitations applicable to those jurisdictions. However, if the jury finds neither burden has been met, then all Plaintiffs will be barred from recovering damages on breaches beyond their respectively applicable statute of limitations.

Application of the Continuing Breach Doctrine

In addition to recognizing various theories to avoid the preclusive effect of a statutory time limitation, some jurisdictions have adopted a continuing breach doctrine. Under this doctrine, a cause of action for breach of a contract does not begin to accrue upon the initial breach; rather, on contracts providing serial performance by the parties, accrual of a breach of contract cause of action commences upon the occurrence of the last breach or upon termination of the contract. *See, e.g., Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 85 F.R.D. 599, 610 (N.D.Ill.1979) (complaint alleged continuing violation that reached back past the limits of the applicable statutes).

Having reviewed the contractual practices involved in this litigation in the context of case law adopting and applying the continuous breach doctrine, the Court finds that the concept cannot be used by Plaintiffs to toll the statutes of limitations. Those jurisdictions which have recognized the doctrine as an alternative equitable resolution to avoid the harsh impact of statutory limitations, applied it to successive or continuous breaches which occurred during the term of a singular contract. *See, e.g., Construction Interior Sys., Inc. v. Donohoe*

Cos., Inc., 813 F.Supp. 29 (D.D.C.1992); *Magna Assocs. v. Torgrove*, 585 F.Supp. 585 (D.Colo.1984); *Mullins v. Rockwell Int'l Corp.*, 15 Cal.4th 731, 63 Cal.Rptr.2d 636, 936 P.2d 1246, 1250 (1997); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md.App. 605, 698 A.2d 1167, 1192 (1997); *AC, Inc. v. Baker*, 622 So.2d 331, 334 (Ala.1993) (for agreements constituting several, separate annual agreements, a breach of contract action accrues on each contract, individually, when performance under each contract is complete); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842 (Tex.Ct.App.-Hous.1984); *Cannell v. Bulicek*, 8 Ohio App.3d 331, 457 N.E.2d 891, 896 (1983).

To decide the propriety of invoking the continuous breach doctrine for evaluating the time of accrual of a cause of action, the Court must first determine whether the contract is continuous or severable in nature. *See, e.g., Burger v. Level End Dairy Investors*, 125 B.R. 894, 901-02 (Bankr.D. Del.1991). Where the nature of the contract is continuous, statutes of limitations do not typically begin to run until termination of the entire contract. *See id.* However, if the nature of the contract is severable, the statutes of limitations generally commence to run on each severable portion of the contract when a party breaches that portion of the contract. *See Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 474-75 (Del.Super.1981).

Here, Plaintiffs renewed their Sales Agreements with Exxon, if at all, every three years. Each Sales Agreement was, therefore, severable in nature, since performance of the parties, as to that Agreement, was presumed complete upon expiration of an express term of years. Although it may be argued that Exxon had a continuous duty to act in good faith in terminating the contract and renewing the relationships with its dealers in subsequent, successive contracts, performance under the Sales Agreements, in and of itself, was severable, giving rise to a cause of action for breach of

contract based on nonperformance. Moreover, as previously set forth in prior orders of this Court, a contractual breach of the covenant of good faith cannot be divorced from the actual breach of contract claim. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617 (3d Cir.1995) (good faith is an interpretive tool to determine the parties' justified expectations, and is not to be used for enforcement of "an independent duty divorced from the specific clauses of the contract"); *see also* UCC § 1-203, cmt. (no independent cause of action exists for failure to perform in good faith).

Plaintiffs have not persuaded the Court that each dealer's succession of Sales Agreements with Exxon constituted one, continuous contract that endured throughout the period of time the Discount for Cash program was in effect. Absent such evidence, or other unique circumstances which would distinguish the instant case from the factual scenarios of cases in which courts rejected the continuous breach doctrine for contracts severable in nature, the doctrine cannot be applied to toll the statute of limitations as codified by the relevant jurisdictions.

Exxon's Affirmative Defense on Grounds of Release

The Operative Language of the Releases

Exxon asserts as an affirmative defense that over 5,193 dealers who are members of the Plaintiff-Class executed standard Mutual Termination and Release Agreements ("Releases"). Except for a small number of Releases,[22] the

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[22] Plaintiffs concede that 385 of the 5,193 Releases do not contain qualifying language that would except the basis of Plaintiffs' breach of contract claim; that is, these Releases do not contain reference to exceptions for "trade accounts" or "reimbursements." As to these Releases, Plaintiffs urge the Court to find that these class members may bring a separate action against Exxon to void the Releases in the event Plaintiffs obtain a successful verdict against Exxon. The Court respectfully declines to address that issue. However, as noted *infra*, the Court concludes that, except in Delaware, even these Releases, *if entered*

standard form documents contain similar language. There are four standard versions of the Release provisions. The vast majority of the Releases include the following language, which defines the scope of the Release:

> Releasing each other, as of the date of this Agreement, from all claims or causes of action which each now has against each other (whether or not known to either) including but not limited to, those arising directly or indirectly under, out of or in connection with each terminated instrument, or any sales or deliveries of petroleum products, tires, batters, and/or accessories by EXXON to DEALER, *EXCEPTING, HOWEVER,* claims of each party against the other for *trade accounts,* . . . rental payments, *reimbursements*, indemnification and/or obligations arising under promissory notes, amortization agreements, mortgages, and/or security agreements, and FURTHER EXCEPTING any claims of EXXON relating to real or personal property heretofore or now in DEALER'S possession.

(Emphasis added).

The second version of the Releases includes the exception for "trade accounts" but not "reimbursements" and the third version excepts "reimbursements" but not "trade accounts." A fourth version of the Releases (approximately 385 in number) contain neither exception.[23] The first appearance of this alteration in the record is reflected in a Release executed in 1993, after this litigation was filed.

Exxon contends that all four versions of the Releases cannot be construed under principles applicable to the UCC,

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into prior to Exxon's disclosure to the dealer-class of its breach, are unenforceable if the jury finds breach of contract and fraudulent concealment *prior to the date the Releases were executed.*

[23] The Court has not undertaken a count of the Releases which fall into this category. However, the parties agree on this point: that no qualifying language is contained in 385 of the Releases in issue.

and that the Releases unambiguously bar all claims and causes of action the parties thereto had, have, or will ever have, whether known or unknown at the time the Release was executed. Plaintiffs aver that the majority of the Releases contain language which expressly excepts the present cause of action from its otherwise broad preclusive effect.[24] Additionally, Plaintiffs submit that the Releases should be construed in conformance with UCC principles, as they are an indivisible and essential part of the course of performance and dealing between Exxon and its dealers. Finally, Plaintiffs question the validity of any Releases executed after certification of the class.

The Court concludes as a matter of law that the Releases do not relieve Exxon of its individual obligation, and class-wide obligation, of good faith under its Sales Agreements with its dealers. To the contrary, Exxon's duty of good faith under the original Sales Agreements was also applicable to its conduct in obtaining Releases from the dealer-class. If the jury determines, through special interrogatories, that Exxon breached its good faith obligation to its dealers under the Sales Agreements, and that such breach was fraudulently concealed from the class, then the Releases may not, in good

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[24] Plaintiffs contend that the plain meaning of the terms "trade accounts" and "reimbursement," which appear in the vast majority of the Releases, unambiguously, and, as a matter of law, except Plaintiffs' claims from the Releases. Although the analysis set forth below does not primarily rely on these arguments, the Court concludes that Plaintiffs' arguments are well-founded as an alternative ground for finding the Releases unenforceable as applied to the specific facts of this case. The term "trade accounts" is defined by Exxon in the Releases as "including without limitation monies due and owing either party associated with motor fuel purchases or any other products purchased from Exxon by Dealer," a description that is readily applicable to this case. Similarly, Plaintiffs' claim is contemplated by the plain and ordinary definition of "reimbursement": "to pay back, to make restoration, to repay that expended; to indemnify, or make whole." *Black's Law Dictionary* (6th ed.).

faith, be uniformly enforced against an involuntary waiver of those rights. Here, Exxon does not contend that any dealer "voluntarily" and "knowingly" waived any rights with respect to the class claims at issue because, without dispute from Exxon, it met its obligations; however, if Exxon did knowingly "take back" the cost of credit adjustment, and, therefore, breached its good faith contractual obligation to its dealers, it would have contracted for the Releases in bad faith, by non-disclosure, thereby nullifying the Releases as to the instant claim. The Court further concludes that: (1) the Releases fall within the governing scope of the UCC; (2) general, all-encompassing releases must be narrowly construed, which dilutes their efficacy; and (3) Releases obtained post-certification may be invalid.

Validity of Releases Under the UCC

Contrary to Exxon's position, the Court finds that the UCC does provide the basic governing law for determining the validity of a release. Under Article 2 of the UCC, the term "waiver" means an intentional relinquishment of a known right. *See In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 297 (N.D.Cal.1977). The waiver of one or more contract provisions leaves the remaining terms in force. *See id.; see also V-M Corp. v. Bernard Dist. Co.*, 447 F.2d 864, 866 (7th Cir.1971).

Releases are a form of contract, and therefore, must be interpreted pursuant to contract law. *See, e.g., Weingart v. Allen & O'Hara*, 654 F.2d 1096, 1103 (5th Cir.1981); *Gibbs v. Dodson*, 229 Ga.App. 64, 492 S.E.2d 923, 926 (1997); *Prall v. Indiana Nat'l Bank*, 627 N.E.2d 1374, 1377 (Ind.Ct.App.1994) ("A release is a species of contract. . . . The interpretation of a release, like any other contract, is determined by the terms of the particular instrument, considered in light of all facts and circumstances."); *Ristau v. Wescold, Inc.*, 318 Or. 383, 868 P.2d 1331, 1333 (1994) ("A

release agreement is a contract subject to the rules of contract construction and interpretation."). Although state contract law must be applied, "the laws concerning the construction of a general release are more or less uniform among the states." *Coral Gables Imported Motorcars, Inc. v. Fiat Motors of No. America, Inc.*, 673 F.2d 1234, 1238 (11th Cir.1982).

Since all of the Releases refer to the termination of the Sales Agreements and Automotive Credit Card Guide, the Releases and Agreements referenced therein are considered and construed in the aggregate. *See, e.g., New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 925 (Tenn.Ct.App.1996) ("A contract must be construed with reference to the situation of the parties, the business to which the contract relates, and the subject matter as it appears from the words used."); *Anheuser-Busch Cos., Inc. v. Summit Coffee Co.*, 858 S.W.2d 928, 933 (Tex.Ct.App.-Dallas 1993) ("When a release refers to a related document, the other document should be taken into consideration."). The Court, having determined that the Sales Agreements at issue come under the auspices of the UCC, finds that the Releases are amenable to UCC construction.

The UCC includes a section, entitled "Waiver or Renunciation of Claim or Right After Breach," which expressly covers the release of claims arising from UCC-governed contracts. *See* UCC § 1-107. The section provides:

> Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

UCC § 1-107. The purpose of this section is to permit parties to renounce or waive "rights or claims arising out of an alleged breach of a commercial contract." UCC § 1-107, cmt. However, in construing the enforceability of a contractual release under the UCC, the provisions of the release "must be read in conjunction with the section imposing an obligation of

good faith." *Id.* This duty of good faith must be present throughout the entire formation, as well as the performance, of the contract. *See* UCC § 2-209; *cf. IPEC Inc. v. International Lithographing Corp.*, 869 F.2d 1080, 1084 (7th Cir.1989) ("Any modification or waiver as to the first contract, though it did not necessarily need to be supported by consideration, had to meet the test for good faith imposed by the Uniform Commercial Code.").

The duty of good faith incorporated into each contract, either express or implied, assures that neither party acts in a manner that destroys the rights or interests of the other party to the agreement. *See Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc.*, 112 Ariz. 392, 542 P.2d 817, 821 (1975). As previous orders of this Court have held, whether Exxon breached its duty of good faith is a question of fact for the jury. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn.1985). However, like contracts, if the terms of the Release are unambiguous, construction of the contract is a matter of law for the Court to decide. *See Ristau*, 868 P.2d at 1333; *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 433 (Fla.1980) (when the language in a release is clear and unambiguous, courts cannot indulge in construction nor interpretation of its plain meaning).

Waiver of a Right Must Be Knowing and Voluntary

The interpretation of the effect of a release is based upon the intention of the parties to the instrument. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346-48, 91 S.Ct. 795, 810-11, 28 L.Ed.2d 77 (1971). In narrowly construing a general release, it is crucial that it be interpreted so that it discharges only those rights intended by the parties to be relinquished. *See Vaughn v. Didizian*, 436 Pa.Super. 436, 648 A.2d 38, 40 (1994). Although courts favor "the finality of settlements," *see, e.g., Pettinelli v. Danzig*, 722 F.2d 706, 710 (11th Cir.1984), "[c]laims or demands . . . are

not discharged unless expressly embraced [in the release] or falling within the fair import of the terms employed." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 188 A.2d 24, 35 (1963). A general release does not discharge liability for unknown damage already done. *See Gibbs v. Dodson*, 229 Ga.App. 64, 492 S.E.2d 923, 926 (1997). Thus, "[a]n intention to release a party from liability for unknown conduct must be clearly expressed in the release." *Id.* at 926-27 (citation omitted).

Jurisdictional Survey

The majority of the jurisdictions relevant to the instant controversy adhere to the general rule that a waiver must be made knowingly and voluntarily, and that "not every settlement that refers to post-settlement conduct necessarily results in a prospective waiver." *Adams v. Philip Morris*, 67 F.3d 580, 584 (6th Cir.1995) (construing a release under Kentucky law).[25] The laws of Delaware, have interpreted the

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[25] The Court finds that, except for Delaware, courts in the relevant jurisdictions concur. *See, e.g., People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24, 28 (1972) ("waiver" is a voluntary relinquishment of a known right); *Casey v. Proctor*, 59 Cal.2d 97, 28 Cal.Rptr. 307, 378 P.2d 579, 584 (1963) (general releases do not extend to claims which the releaser does not know or suspect to exist in his favor at the time of executing the release); *Scotten v. Landers*, 190 Colo. 27, 543 P.2d 64, 66 (1975) ("equity will strike down without hesitation" any release which is not fairly and knowingly made); *Muldoon*, 650 A.2d at 1245 (the Connecticut Supreme Court has held that "[t]he general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not arisen at all, cannot be considered as bound and concluded by the anticipatory words of a general release."); *Columbus Hotel Corp. v. Hotel Management Co.*, 116 Fla. 464, 156 So. 893, 901-02 (1934) (release entered into between parties who had "been long engaged in attempting to adjust a highly complicated controversy" supported conclusion that parties were "fully apprised of all material matters affecting the settlement contract as executed"); *Conner v. Fisher*, 136 Ind.App. 511, 202 N.E.2d

concept of a general release as encompassing all claims between the parties, whether in the contemplation of the parties or in existence at the time the release was made. *See*

572, 575 (1964) ("waiver" is the voluntary yielding up of some existing right); *Bernstein v. Kapneck*, 46 Md.App. 231, 417 A.2d 456, 464-65 (1980) (a release does not bar existing but unknown damages "not within the contemplation of the parties at the time of contracting for such release"); *Kerr v. Small*, 112 Mont. 490, 117 P.2d 271, 273 (1941) (equates "waive" with "acquiesc[e]" in tax deed validity contest); *Gerbig v. Gerbig*, 60 Nev. 292, 108 P.2d 317, 318 (1940) (equates "waive[r]" with "voluntar[y]" acceptance); *Keelan v. Bell Comm. Research*, 289 N.J.Super. 531, 674 A.2d 603, 609 (1996) (a release executed by one "who is unaware of his rights is not a knowing or voluntary release"); *Beneficial Finance Co. of Jersey City, Inc. v. Norton*, 76 N.J.Super. 577, 185 A.2d 218, 220 (A.D.1962) ("waiver" is a voluntary, clear and decisive act, implying an election to forego some advantage which the waiving party might have insisted on); *Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 471 P.2d 172, 174 (1970) ("[i]n no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby");*Vaughn*, 648 A.2d at 40 ("The courts of Pennsylvania have . . . interpreted the release as covering only such matters as can fairly be said to have been within the contemplation of the parties when the release was given."); *New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 925 (Tenn.Ct.App.1996) ("a demand of which a party was ignorant when the release was given is not as a rule . . . embraced therein"); *Panorama Residential Protective Ass'n v. Panorama Corp. of Wash.*, 97 Wash.2d 23, 640 P.2d 1057, 1060 (1982) ("a waiver is an intentional and voluntary relinquishment of a known right"). The Court acknowledges that its jurisdictional analysis has rendered a result different from those of the parties. The Court concedes that the majority of the cases used in its jurisdictional survey did not involve underlying UCC contracts, but the analysis appears analogous to the Release circumstances at issue in the instant matter. Moreover, the Court found no authority to preclude the applicability of common law principles where they are not displaced by provisions of the UCC. *See Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash.App. 327, 493 P.2d 782, 787 (1972) (construing release of claims arising from underlying UCC contract). Given these decisions, it can be logically concluded that releases interpreted under the UCC would receive the same analysis and result in similar conclusions.

Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 856 (Del.1952) ("a general release, one which is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise" is a "general and final settlement" of all claims of the parties).[26] Moreover, in Virginia, while there must be an intent to include a claim of unknown damages, the releaser must show mutual lack of intent by "clear, cogent and convincing evidence." *Marshall v. Cundiff*, 211 Va. 673, 180 S.E.2d 229, 232 (1971).

Although general releases may be enforceable, it is commonly held that "based on a realistic recognition that releases contain standardized, even ritualistic, language and are given in circumstances where the parties are looking no further than the precise matter in dispute," ascertaining the underlying intent of the parties and their knowledge at the time of executing the release is crucial. *Mangini v. McClurg*, 24 N.Y.2d 556, 301 N.Y.S.2d 508, 513, 249 N.E.2d 386 (N.Y.App.Div.1969). Relevant to the inquiry "is whether there has been a conscious and deliberate intention by the parties to release" the claims which existed but were unknown to them at the time they entered into the release. *LaFleur v. C.C. Pierce Co., Inc.*, 398 Mass. 254, 496 N.E.2d 827, 832 (1986).

Of course, a compromise and settlement of a *bona fide* controversy between the parties constitutes a valid and binding agreement. *See Ruble Forest Prods., Inc. v. Lancer Mobile Homes of Oregon, Inc.*, 269 Or. 315, 524 P.2d 1204, 1206 (1974). Thus, a release which clearly and unequivocally mentions the claim to be released acts as a complete bar

[26] As to Delaware, the Court concludes that the Releases involved are not enforceable against the affected dealers that included the "exception" language referenced in footnote 24, *supra*. The Delaware Releases would be enforceable, if at all, against those dealers whose Releases contain no such qualifying language (i.e., the Category-four releases).

concerning all matters covered by the release. *See Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex.1991) (claims not clearly within the subject matter of the release are not discharged, even if they existed when the release was executed; the release must "mention" the claim to be released).

Application of Jurisdictional Law to the Releases

Viewing the Releases in the context of the applicable laws, there is no clear language that the parties intended the Releases to bar claims for Exxon's alleged breach of its promise to offset the credit card processing fee against its wholesale fuel price. As noted above, Exxon's own position, at least throughout these proceedings, belies any intent on its part to have included the instant breach of contract claim in the Release.

Exxon has repeatedly represented that it was not legally obligated to reduce its wholesale fuel price, however, it nonetheless did lower the price in an amount which "on average" offset the cost of credit card receipts submitted by its dealers. Exxon has steadfastly denied the validity of Plaintiffs' breach of contract claim. Since it was not clear to the parties that Plaintiffs even had a claim, there is no evidence to permit a reasonable inference that the parties agreed to extinguish the instant action. Moreover, the Sales Agreement explicitly states: "Termination of this contract by either party for any reason shall not relieve the parties of any obligation theretofore accrued under this contract." Sales Agreement, at ¶ 18(g). his language, together with Exxon's own exceptions for "trade accounts" and "reimbursements," would tend to infer that rights already perfected under the respective Sales Agreement could not be waived. Given these circumstances and Exxon's position, the Court concludes, as a matter of law, assuming the jury finds breach of contract and fraudulent concealment, that the affected dealers did not

[and could not] knowingly and voluntarily intend to waive damages resulting from a breach of the covenant of good faith in fixing the open price term when the Releases were executed.

Validity of Releases Executed Post-Certification

The parties dispute the validity of the Releases entered into between Exxon and members of the Plaintiff-Class after the filing of the instant action and the issuance of the order certifying this case as a class action. Plaintiffs contend that the Releases are unenforceable as a bar to this action, because Exxon did not disclose the existence of the pending litigation or dispute, and therefore, these dealers did not knowingly and voluntarily release the claims involved in this suit. Plaintiffs additionally argue that these Releases should be set aside because ethical rules governing attorneys precludes a party from settling with individual class members in the absence of participation by counsel for the class. In response, Exxon urges that the Releases are valid and act to totally bar this action.[27]

The Court finds that the post-certification Releases are governed by the same principles of law and policy that

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[27] In support, Exxon cites to a prior order entered by Judge Kehoe in July 1992, which denied Plaintiffs' motion to enjoin Exxon from entering into the Releases. However, having reviewed Judge Kehoe's order entered July 1, 1992, the Court disagrees with Exxon's interpretation. Judge Kehoe found "no evidence . . . to suggest that [Exxon was] seeking out these potential class members for the purposes" of undermining the participation of dealers in the class action by "obtaining releases." Order [D.E. # 218], at 2-3. Because Judge Kehoe found that not allowing Exxon to inform the terminating dealers of the pending litigation, which was necessary for an informed waiver, placed Exxon in an untenable position, he specifically refused to enjoin Exxon's business practices of procuring a Release "when a dealer *chooses to end his relationship*." *Id.* at 3 (emphasis added).

govern the pre-certification Releases. That is, for the Releases to be valid, they must have been knowingly and voluntarily made and procured in good faith. *See, e.g., Scotten v. Landers*, 190 Colo. 27, 543 P.2d 64, 67 (1975).

Having reviewed an exemplar of the Release executed post-certification, as supplied by the parties, the Court finds no express mention of the instant litigation. Because this action was pending at the time these Releases were negotiated and executed, even if the affected Plaintiffs had constructive notice of the claims filed by the dealer-class, the Releases do not definitively demonstrate that the claim was intended by the parties thereto to be included in the general waiver of claims. *See Victoria Bank & Trust Co.*, 811 S.W.2d at 938 (if the claims existed when the release was executed, the release must mention the claims to be discharged). Consequently, the Court concludes, as a matter of law, that the Releases executed after certification of the Plaintiff-Class cannot bar those Plaintiffs from participating in the litigation of this action.[28]

ISSUES REGARDING PREJUDGMENT INTEREST

Plaintiffs have requested that any judgment entered in their favor include all interest which accrued prior to the rendered verdict. Exxon opposes Plaintiffs' contention that the issue of prejudgment interest can be handled on a class-wide basis. Rather, according to Exxon, the various jurisdictions differ as to the decisionmaker of entitlement to prejudgment interest, the time from which prejudgment interest accrues, and the nature of the evidence relevant to deciding whether and to what extent Plaintiffs are entitled to prejudgment interest. Having reviewed the submissions of the parties and

[28] Having found that the post-certification Releases do not preclude those Plaintiffs from proceeding to a verdict, it is unnecessary for the Court to address whether the Releases obtained post-certification are voidable based on ethical rules regulating the practice of law.

conducted an independent search of the laws in the relevant jurisdictions, the Court concludes as follows:

> Prejudgment interest, pursuant to statute, is awarded as a matter of right in twenty-five jurisdictions, and accrues from the date on which the money was wrongfully withheld, in this case, from the date of the breach.[29] Those jurisdictions are: Alabama, California, Colorado, Delaware, District of Columbia,[30] Florida, Georgia, Kentucky, Louisiana,[31] Maryland,[32] Massachusetts,

[29] These jurisdictions require that the damages be liquidated in nature. "A claim is liquidated when it is subject to mathematical computation without reliance on opinion or discretion." *Aries v. Palmer Johnson, Inc.*, 153 Ariz. 250, 735 P.2d 1373, 1384 (Ct.App.1987). Based on the evidence in the record and the testimony of the parties' respective experts, the Court has determined that Plaintiffs breach of contract damages are liquidated. As trial progresses, should it become apparent that the damages are not calculable as to be "subject to mathematical computation," the Court shall amend its conclusion accordingly.

[30] Two sections of the District of Columbia's Code regulate the allowance of interest on judgments. Under D.C.Code § 15-108, prejudgment interest is mandatory "to recover a liquidated debt on which interest is payable by contract or by law or usage." Pursuant to D.C.Code § 15-109, prejudgment interest is merely discretionary when the amount is unliquidated or is not provided by contract, law, or usage. *See Giant Food, Inc., v. Jack I. Bender & Sons*, 399 A.2d 1293, 1305 (D.C.1979). Under the circumstances, the Court finds that § 15-108 applies, permitting the award of prejudgment interest as a matter of right. Although the contracts at issue are silent as to the award of any interest, case law instructs that "[w]here there has been a complete deprivation, prejudgment interest is an element of complete compensation for the loss of use of [ ] money 'from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.'" *Nolen v. District of Columbia*, 726 A.2d 182, 185 (D.C.1999) (quoting *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1253 (D.C.1990) and *West Virginia v. United States*, 479 U.S. 305, 310-11 n. 2, 107 S.Ct. 702, 706 n. 2, 93 L.Ed.2d 639 (1987)).

[31] Louisiana has different accrual periods, depending on whether the claim is for a breach of a promise under the contract ("*ex contractu*"), for which interest begins accruing from the time of the breach, or whether

Montana, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington,[33] West Virginia, and Wyoming.[34] While three additional jurisdictions award prejudgment interest as a matter of right, interest is calculated as accruing from the date Plaintiffs made formal judicial demand, which would be the date the

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damages are requested for a breach of a duty under a contract ("*ex delicto*"), for which interest accrues from the date of the judicial demand, or the filing of the complaint. Since the Court has repeatedly found that a breach of the duty of good faith cannot be a separate cause of action, the Court concludes that any prejudgment interest should accrue from the date of the breach.

[32] For entitlement to prejudgment interest as of right in Maryland, there must be an obligation to tender a certain sum upon a certain date. *See Crystal v. West & Callahan, Inc.*, 328 Md. 318, 614 A.2d 560, 572 (1992) ("The ordinary rule in contract cases, if the contract requires payment of a sum certain on a date certain, is [that] prejudgment interest typically is allowed as a matter of right.").

[33] In Washington, although entitlement to prejudgment interest on liquidated claims is a matter of right, a trial court, in its discretion, may reduce or disallow such interest upon a finding that the plaintiff unreasonably delayed in prosecuting a claim. *See Colonial Imports v. Carlton Northwest, Inc.*, 83 Wash.App. 229, 921 P.2d 575, 583 (1996) ("prejudgment interest on liquidated claims ordinarily is a matter of right, but . . . trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants.").

[34] Wyoming normally requires that a formal demand notifying the defendant that an amount is due be made before the accrual period for interest commences. *See, e.g., Northern Gas Co. v. Town of Sinclair*, 592 P.2d 1138, 1143 (Wyo.1979). However, the Wyoming Supreme Court has also recognized that when deprived of the beneficial use of money, a plaintiff should be compensated for the loss during the time of the deprivation. *See Goodwin v. Upper Crust of Wyoming, Inc.*, 624 P.2d 1192, 1198 (Wyo.1981) (the plaintiffs "were entitled to the use of the money they were to receive under the agreement from the date it became due. . . . [Therefore,] [p]rejudgment interest should have been awarded in an attempt to compensate for that loss.").

Complaint was filed on May 13, 1991. These jurisdictions are: Arizona, Maine, and New Hampshire.

In the remaining jurisdictions, entitlement to prejudgment interest is discretionary, requiring the presentation of evidence in support of such entitlement. Only one jurisdiction, Virginia, requires that the issue be decided by the fact finder. *See* Va.Code Ann. § 8.01-382 ("In any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, *may* provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.") (emphasis added); *see also Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 449 S.E.2d 799, 801 (1994) ("This section provides for the discretionary award of prejudgment interest by the trier of fact, who 'may provide for' such interest and fix the time of its commencement. The accrual of postjudgment interest, however, is mandatory. . . ."). The Virginia Supreme Court has declared that "prejudgment interest is an element of compensatory damages." *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307, 321 (1999) (citation omitted).

While Virginia's statute clearly assigns the discretionary authority to award prejudgment interest to the jury, the proof necessary for deciding whether it is appropriate and from what date prejudgment interest should accrue is less defined. However, appellate decisions instruct that the touchstone is a sum that will fully and fairly compensate Plaintiffs for the damages sustained for the delay in the payment of money due. *See, e.g., Gill v. Rollins Protective Servs. Co.* 836 F.2d 194, 198 (4th Cir.1987) (prejudgment interest is compensatory in nature "and is designed to compensate the plaintiff who has been without deserved relief for an extended period of time."); *City of Danville v. C & O Ry.*, 34 F.Supp. 620, 638 (W.D.Va.1940) (prejudgment interest is allowed when it "appears necessary to compensate the plaintiff adequately, i.e.

to make him whole"); *COOMBS v. SUMMITT*, 1996 WL 1065539, at *5 & n. 6 (Va.Cir.Ct. May 20, 1996) (providing Virginia Model Jury Instruction regarding damages and prejudgment interest in a negligence cause of action).[35]

In six jurisdictions, the Court decides whether prejudgment interest should be awarded. Those jurisdictions are: Connecticut, Indiana, Mississippi, New Jersey, New Mexico, and Tennessee. *See* Conn.Gen.Stat.Ann. § 37-3a; *Brandewiede v. Emery Worldwide*, 890 F.Supp. 79, 82 (D.Conn.1994) ("An award of prejudgment interest pursuant to Section 37-3a is an equitable determination within the discretion of the court."); Ind.Code Ann. § 34-51-4-7; Miss.Code Ann. § 75-17-7; N.J.Stat.Ann. § 12A:2-710; *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1070 (1988) (prejudgment interest may be awarded on contract claims in the discretion of the court in accordance with equitable principles); N.M.Stat.Ann. § 56-8-4; Tenn.Code Ann. § 47-14-123. However, in Mississippi, accrual is not discretionary, and commences at the time the complaint was filed. *See* Miss.Code Ann. § 75-17-7 (the judgment "shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no

[35] This Court does not have ready access to the Virginia Model Jury Instructions. Therefore, Plaintiffs' counsel shall be responsible for providing the relative instruction and to brief the Court as to the evidence they intend to proffer to assist the jury in determining: (1) the propriety of prejudgment interest for the Virginia Plaintiffs necessary to fully compensate for the loss of the use of any wrongfully withheld money by Exxon; and (2) the date from which prejudgment interest should accrue in order to effectuate complete relief. Recognizing that the proffer of this evidence as to only the Virginia Plaintiffs might infer that either: (1) only Virginia Plaintiffs would be entitled to prejudgment interest; or (2) all other Plaintiffs will receive prejudgment interest in the event of a favorable verdict, the Court shall bifurcate that part of the proceedings to ensure the interests of the Virginia Plaintiffs, as well as Exxon, are equally considered and protected.

event prior to the filing of the complaint."). Similarly, while Indiana allows for some judicial discretion, "the court shall determine the period during which prejudgment interest accrues. . . . However, the period may not exceed forty-eight (48) months." Ind.Code Ann. § 34-53-4-8. In Connecticut, New Jersey, New Mexico, and Tennessee, the Court is given full discretionary authority to determine the appropriate time from which prejudgment interest may be awarded. Nevertheless, the Court must recognize that "the equitable purpose of prejudgment interest is to compensate a party for lost earnings on a sum of money to which it was entitled, but which has been retained by another." *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J.Super. 13, 696 A.2d 31, 39 (App.Div.1997); *see also Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn.1992). Factors which the Court may consider in reaching a determination include: whether the detention of the money was wrongful under the circumstances; whether the sum recovered was a liquidated amount; and whether Plaintiffs diligently presented their claim. *See Brandewiede*, 890 F.Supp. at 82.

The remaining issue necessary for resolution is the rate at which interest should accrue. For instance, the New Mexico statutory rate of prejudgment interest becomes fixed at the rate in effect at the time the action is filed. *See Grynberg v. Roberts*, 102 N.M. 560, 698 P.2d 430, 433 (1985). While in other jurisdictions, it will be necessary to determine the various rates to which prejudgment interest was subjected throughout the entitlement period—either from the date of breach or the date the complaint was filed. The parties will be required to supply such data to the Court. Otherwise, the entitlement and accrual periods of prejudgment interest shall be in accordance with the aforementioned conclusions.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jul 01, 1999]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SUBJECT MATTER JURISDICTION

Plaintiffs move pursuant to Fed.R.Civ.P. 56 for partial summary judgment with respect to the court's subject matter jurisdiction over those members of the named class and the putative class with claims that may be less then the $50,0000 amount in controversy jurisdictional threshold in effect at the time the diversity-based class action was filed. For reasons stated below, I conclude that the court has subject matter jurisdiction over Plaintiffs' claims and over the claims of all class members, including those named Plaintiffs' and putative class members whose claims may not meet the minimum amount in controversy requirement of 28 U.S.C. § 1332.

The essential facts related to the Plaintiffs' motion are not disputed. At the time the initial complaint in this case was filed May 1991, the required minimum jurisdictional amount

was $50,000. Plaintiffs' have alleged that the court has supplemental jurisdiction under 28 U.S.C. § 1367 [First Amended Complaint, ¶ 3.] Several of the named Plaintiffs' claims are over $50,000.

My predecessor, Judge Kehoe, previously denied Exxon's motion to dismiss for lack of subject matter jurisdiction on October 12, 1994. His order did not address or consider the applicability of supplemental jurisdiction. While the Magistrate Judge did discuss supplemental jurisdiction in his report and recommendation [recommending that Exxon's motion to dismiss for lack of subject matter jurisdiction be denied], his petition on supplemental jurisdiction was *dicta* and not binding on this court. In any event, I conclude it is wrong as a matter of law.

Admittedly, there is a legitimate division of opinion on this subject matter and Magistate Brown's view may be proven ultimately correct. I, however, have addressed the legal aspects of this issue at .ength in *Leszcznski v. Alliance Insurance Co.*, 176 F.R.D. 659 (S.D. Fla. 1997) and relied on decisions from the Fifth and Seventh Circuits[1] which concluded that section 1367 overruled *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)(holding that each putative class plaintiff had to satisfy the amount in controversy, or be dismissed from the class action). Since *Leszcznski*, the Third and Tenth Circuits have concluded that *Zahn* remains valid. *See Mritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) and *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

To date, The Eleventh Circuit has not ruled on the issue. It has recognized that "[S]ome dispute exists as to whether *Zahn* has been overruled by the recent passage of 28 U.S.C. section 1367(b) which would provide supplemental juris-

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[1] *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) and *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996)

diction over class members' claims so long as one class representative meets the jurisdictional requirement. [citations omitted]. We need not address this issue because we hold that the class claim for punitive damages may be considered in the aggregate when determining the amount in controversy." *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 n.9 (11th Cir. 1996).

Pending a contrary ruling from the United States Supreme Court or the Eleventh Circuit, I continue to adhere to *Leszcznski* and conclude that supplemental jurisdiction is applicable in diversity cases such as this case. I concur with Plaintiff that no single dealer or small group of dealers could ever have afforded to prosecute a case like this one against Exxon unless courts exercise supplemental jurisdiction. For better or worse, the class is entitled to their day in court.

WHEREFORE, it is ORDERED that Plaintiffs' Motion for partial Summary Judgment Regarding Subject Matter Jurisdiction is GRANTED.

ORDERED THIS 1 DAY OF July, 1999.

/s/ [illegible]
ALAN S. GOLD
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Apr 21, 1998]

Case No. 91-0986-Civ-Kehoe
United States Magistrate
Judge Stephen T. Brown

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

ORDER ON EXXON'S MOTION TO DECERTIFY THE CLASS FOR COUNTS I AND III OF THE FIRST AMENDED COMPLAINT

THIS CAUSE came before the Court upon Defendant Exxon's Motion to Decertify the Class for Counts I and III of the First Amended Complaint [Docket No. 746]. After reviewing the record, hearing argument of counsel, and otherwise being fully advised in the premises, it is hereby ORDERED and ADJUDGED that Exxon's Motion is DENIED.

Exxon argues that individual issues predominate over common ones, that a change in circumstances has occurred since the case was originally certified by this Court, and that this cause is unmanageable as a class action. The Court disagrees.

The common issues which govern this dispute have their origin in Exxon's alleged obligation as to all of its branded dealers over a twelve (12) year period to "unbundle" a 3% credit cost recovery fee from the wholesale price of motor fuel. Throughout this time period, Exxon claimed to its dealers, and others, that it had reduced the wholesale price of motor fuel by an amount sufficient to offset the 3% credit cost recovery fee it first began to charge in August of 1982. Exxon asserts that it has accomplished this "unbundling" of credit cost recovery fees by maintaining a wholesale pricing system which compared its wholesale prices to its competitors so that "on average, over time, across all markets," the reduction would be found in the ultimate price. By its very nature, this alleged obligation is owed to the entire class of dealers, the breach of which can be determined *only* by an "on average, over time, across all markets" analysis of Exxon's relationship with *all* of its dealers.

The existence of some individual issues does not defeat the commonality requirement of Federal Rule of Civil Procedure 23, which requires only that common issues predominate, not that they be unanimous. Thus, ". . . claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action . . ." *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983); *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992); *Kreuzfeld v. Carnehammer*, 138 F.R.D. 594, 599 (S.D. Fla. 1991); *Pottinger v. City of Miami*, 720 F.Supp. 955, 958-59 (S.D. Fla. 1989). Furthermore, courts have held that a class meets the commonality requirements of Rule 23(b) when the defendant has a standardized policy or course of conduct toward members of the proposed class. *CV Reit*, 144 F.R.D. at 696 (S.D.Fla. 1992); *Lawson v. Wainwright*, 108 F.R.D. 450, 458 (S.D. Fla. 1986).

The fact that Exxon's dealer Sales Agreements changed in some respects during the class period is not determinative. All

the agreements are governed by the provisions of Article 2 of the Uniform Commercial Code, which permits the introduction of parol evidence to explain, or construe, the terms of a writing. Because the principal contractual issues in this case include course of dealing and course of performance evidence which uniformly applies to all members of the class, and because that evidence consists entirely of what Exxon wrote, did or said in its uniform relationship with its dealer network, the fact that Exxon employed various editions of its standard form agreements is irrelevant. *See Kleiner v. First National Bank of Atlanta*, 97 F.R.D. 683 (N.D. Ga. 1983).

Exxon's assertion of various affirmative defenses does not change this conclusion. Decertification is not warranted merely because particular defenses may be available against individual class members. *E.g., Merk v. Jewel Food Stores I*, 702 F.Supp. 1391, 1395 (N.D. Ill. 1988); *Riordan v. Smith Barney*, 113 F.R.D. 60, 65 (N.D. Ill. 1986); *Dirks v. Clayton Brokerage Co. Of St. Louis Inc.*, 105 F.R.D. 125, 132 (D. Minn. 1985); *Newberg on Class Actions*, § 4.26, p. 326.

Moreover, as asserted by the Plaintiffs, instead of creating a predominance of individual issues, Exxon's affirmative defenses can be viewed as raising even more common issues of law and fact. For example, Plaintiffs' rebuttal of Exxon's statute of limitations defense is based upon Exxon's alleged fraudulent concealment of the Plaintiffs' claims on a class-wide basis, thereby making the issue appropriate for class action determination. *See, Walsh v. Ford Motor Co.*, 616 F.Supp. 1170, 1171 (D.D.C. 1985). And determination of Exxon's release defense will be based upon a uniform and class-wide interpretation of the appropriate scope of Exxon's standard form release agreement. Under these circumstances, any individualized proof that may arise in connection with the releases does not outweigh the benefits of proceeding as a class action. *See Jennings Oil Co., Inc. v. Mobil Oil Corp.*, 80 F.R.D. 450, 458 (S.D.N.Y. 1978).

Finally, Exxon has failed to demonstrate a change in circumstances since the time this action was initially certified as a class legally-sufficient to justify decertification at this time. The consideration of a motion for decertification of a class is governed by a higher standard than that applied to the original certification motion. Exxon must demonstrate the existence of newly-discovered facts or law or that the circumstances have materially changed in support of its decertification motion.[1] *Washington v. Vogell*, 158 F.R.D. 689, 692-693 (M.D. Fla. 1994); *In re Harcourt Brace Jovanovich, Inc. Sec. Lit.*, 838 F.Supp. 109, 115 (S.D.N.Y. 1993); *Robin v. Doctors Officenters Corp.*, 686 F.Supp.199 (N.D. Ill. 1988); *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975). Rearguing grounds which were or could have been argued earlier, is not sufficient. *In re Harcourt*; 2 Herbert Newburg and Alba Conte, *Newberg on Class Actions* §7.47 (3d Ed. 1992).

In this case, Exxon has not produced meaningful evidence in support of decertification. In addition, each of the five arguments now asserted by Exxon was previously made and rejected by this Court at the certification stage. The previously rejected arguments include Exxon's claim that certain contractual documents were not uniformly sent to all dealers, that the contract claims require consideration of

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[1] Exxon contends that this Court should undertake a *de novo* analysis of certification, notwithstanding years of extensive discovery, briefing and determining that this case is appropriate for class action treatment. Exxon relies on *Ezell v. Mobil Housing Board*, 709 F.2d 1376 (11th Cir. 1983). In *Ezell*, the district court entered the certification order *only one month* after the action was brought. Then, realizing the hastiness of its decision, the court held an evidentiary hearing on certification at which the plaintiffs were unable to present any evidence of class-wide discrimination. Only after this evidentiary hearing, during which the court analyzed the evidence for the first time, did it enter a decertification order decertifying the class. This Court followed an entirely different process in initially certifying this case.

extrinsic evidence, that the statute of limitations and fraudulent concealment doctrines vary among thirty-five states and require individualized proof, that there were four different price terms of different Sales Agreements (rather than just one) in effect and applicable to class members, and finally, that the issue of whether an individual dealer was "double-charged" requires dealer-by-dealer proof. Accordingly, the Court finds that decertification is not warranted.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 21st day of April, 1998.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT COURT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jun 25, 1996]

CASE NO. 91-0986-CIV-KEHOE
UNITED STATES MAGISTRATE JUDGE
STEPHEN T. BROWN

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR CERTICATION OF CLASS WITHOUT QUALIFICATION

THIS MATTER came on before the Court on Plaintiffs' Motion for Certification of Class Without Qualification, and after having reviewed the Motion, the Response thereto of Defendant, Exxon Corporation, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Certification of Class Without Qualification is hereby GRANTED.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 25th, day of June, 1996.

/s/ James W. Kehoe
UNITED STATES DISTRICT COURT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct 25. 1995]

Case No. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC.,
a Florida corporation, *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
a New Jersey corporation,
Defendant.

ORDER

FOR THE REASONS stated in the Report and Recommendation of the United States Magistrate Judge, and upon independent review of the file, it is

ORDERED AND ADJUDGED that the motion to certify the "Discount for Cash" class [Docket No. 511 is GRANTED *subject* to further inquiry by the court into the ability of the class to handle the costs and expenses of this litigation.[1]

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 25th day of October, 1995.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

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[1] At, or prior to, the trial in this matter set for the week of November 6, 1995, the Court will hear argument on the issue of the " . . . ability of the class to handle the cost and expenses of this litigation."

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct 12, 1994]

Case No. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC., a Florida corporation, *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION, a New Jersey corporation,
Defendant.

ORDER

FOR THE REASONS stated in the Report and Recommendation of the United States Magistrate Judge [Docket No. 338], and upon an *careful* and *independent* review of Defendant's objections to the report and recommendation, the Plaintiffs' response to the objections, the Defendant's reply to the Plaintiffs' response, and the file generally, it is

ORDERED AND ADJUDGED that the Defendant's motion to dismiss the amended complaint for lack of subject matter jurisdiction [Docket No. 296] is *DENIED*.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12th day of October, 1994.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX O

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-KEHOE

ALLAPATAH SERVICES, INC., *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

REPORT AND RECOMMENDATION
RE: CLASS CERTIFICATION

THIS MATTER is before this Court on plaintiff's Motion for Certification of Plaintiff's "Discount for Cash" Class. This Court has reviewed the motion, the response, the reply, the surreply of the defendant, the surrebuttal of the plaintiffs, and the entire file in this cause. Additionally, this Court conducted a lengthy hearing and heard argument of counsel on June 9, 1994.

THE CASE

The plaintiffs in this case are retail dealers who had Sales Agreements with the defendant. The plaintiffs allege that the defendant breached the standard form written agreements with its retailers. The plaintiffs allege, in the alternative, that either Exxon breached the Sales Agreements by unilaterally modifying the agreement and then failing to live up to the modification, or that the defendant breached the implied

terms of the agreements by charging the plaintiffs twice for the same "credit card processing charge."

The plaintiffs seek to certify the following "Discount for Cash" Class:

> All persons and/or entities owning and/or operating businesses for the retail sale of Exxon gasoline who were parties at any time from August 1982 through the present to a standard Sales Agreement with Exxon and who were damaged by Exxon's failure to remove from the wholesale price of gasoline the charge for credit card processing.

The complaint in this action contains four counts. The first is essentially the breach of the written agreement. The second claims a breach of oral contract. The third makes a claim for unjust enrichment, and the fourth deals with alleged damages suffered as a result of the Valdez oil spill. This report and recommendation only addresses Counts I and III of the complaint.[1]

ALLEGED FACTS

Prior to August 1982, it is alleged that built into the wholesale price of gasoline sold to Exxon retailers was a charge for processing credit card payments. It is further alleged that in August of 1982 Exxon undertook to change their process of billing for credit card processing. Exxon instituted, on a national basis, a 3% surcharge on all credit card processing. It further undertook to remove that credit card charge from the wholesale price of gasoline, thereby

[1] As to Count II—the count for oral contract—the plaintiffs do not appear, from their motion, to be seeking to certify class on that basis—a wise decision on their part. This Court has presently pending a report and recommendation recommending the dismissal of Count IV, and the plaintiffs have not sought to certify class with regard to that count, at the present time.

reducing the price of gasoline it sold to its retailers. This decision and its subsequent implementation was published in written documentation circulated throughout the nation as well as oral presentations. While there are questions surrounding exactly when, where, and how this change in procedure was publicized, there is evidence in the record to support that the procedure was implemented on a standardized basis throughout the country. Both prior to and subsequent to the implementation of this change in pricing, the standard Sales Agreement[2] provides that the buyer agrees to pay the seller for the seller's product "seller's established dealer price appropriate for the transaction."

Finally, it is alleged by the plaintiffs that after implementation of this new procedure, Exxon proceeded to extract the 3%, credit card charge from the dealers but did not correspondingly remove credit card charging fees from the wholesale price of gasoline, thereby having the effect of charging retailers twice for credit card processing if they utilized credit card processing in their dealership, or alternatively, failing to lower the wholesale price of fuel to dealers, per their nationwide agreement to do so, even if they did not actually process credit card charges.

Essentially, the allegations are that Exxon agreed to lower the "seller's established dealer price appropriate for the transaction . . ." in August of 1982 so as to only charge dealers for credit card processing actually used, but in reality failed to do so.

LEGAL ANALYSIS

Rule 23 of the Federal Rules of Civil Procedure governs the certification and maintenance of class actions. Under Rule

[2] Defendants point out that there are some differences in the standard Sales Agreement signed by various Exxon retailers, but for the purposes of this report and recommendation, the distinctions therein do not affect this Court's decision.

23, plaintiff must initially satisfy each of the four threshold requirements of Rule 23 (a):

(1) the class must be so numerous that joinder of all members is impracticable;

(2) questions of law or fact common to the class must exist;

(3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and

(4) the representative parties must fairly and adequately protect the interests of the class.

Plaintiffs seeking to represent the class bear the burden of establishing that all four requirements have been met. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), *reh'g denied en banc*, 832 F.2d 1267 (11th Cir. 1987), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2 421 (1988); *Gilchrist v. Bolger*, 733 F.2d 1551 (11th Cir. 1984); *Kreuzfeld v. Bertill Carnehammar*, 138 F.R.D. 594 (S.D. Fla. 1991).

Once the requirements of Rule 23(a) have been satisfied, plaintiffs must then demonstrate the action sought to be certified falls within one of the categories set forth in Rule 23(b).[3] *See Kirkpatrick*, *supra*.

Rule 23(b)(3) provides for class certification where:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the

[3] While the specific magic words are not spelled out, it is obvious from the motion of the plaintiffs that they seek to certify this class under Rule 23(b)(3).

> fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of members of the class and individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of a class action.

Each of the elements will be discussed in turn as it applies to this case this case.

NUMEROUSITY

Neither party has argued that the numerosity requirement is not satisfied. Indeed, there is a stipulation by the plaintiffs that the class members are so numerous the joinder of all of them is impracticable. There is no argument by the defendant to the contrary. However, "[T]he defendants' own argument that the massiveness of the class militates against certification eloquently argues that the numerosity requirement is satisfied." *See Coleman v. Cannon Oil Company*, 141 F.R.D. 516, 520 (M.D. Ala. 1992). A close question should be resolved in favor of the finding of numerosity. *See Kreuzfeld*, *supra*. Even a mere inconvenience in being able to join all of the persons makes class litigation desirable. *See In re: Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. 1986).

COMMONALITY OF QUESTIONS OF LAW AND FACT

In order to certify a class, it must be established by the plaintiffs that there is a presence of common questions of law or fact. However, this does not require that all class members

have exactly the same legal claims. *See Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).[4] As one court has noted, the issue appears to turn on whether or not there is at least one issue that affects all or a significant number of the proposed class members. *See Kreuzfeld, supra.* Allegations of standardized conduct by defendants toward members of the proposed class will support a finding of commonality. *See In re: Amerifirst Securities Litigation*, 139 F.R.D. 423 (S.D. Fla. 1991). Allegations of such standardized conduct are clearly present in this case. As indicated earlier, there are allegations, along with at least some evidence to support same, that Exxon took action on a standard nationwide basis and then failed to follow through on the very actions it undertook.

Exxon argues that since there is no signed written modification to any of the Sales Agreements, plaintiffs' contention that the agreements were unilaterally modified in 1982 is without merit. However, there are two problems with Exxon's position:

(1) That argument goes to the merits of the case which is not an appropriate consideration on a motion for class certification. *See Kirkpatrick, supra; Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984).

(2) The allegations of this case do not require proof of a modification to the Sales Agreement in order for the plaintiffs to prevail.

The Sales Agreement provision for establishing price was the same prior to 1982 as it is subsequent thereto. Those terms have not changed. What is relevant here is that extrinsic evidence must be considered in determining the "seller's

[4] Cases decided by the Fifth Circuit prior to October 1, 1981, are binding in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

established price *appropriate for the transaction . . .*" (emphasis added).[5] Therefore, while there may not have been a modification to the contract in the strict sense as argued by the defendant, it is alleged that Exxon's actions may be construed to have changed the "seller's established price appropriate for the transaction . . ." and therefore plaintiffs may be able to support their position without an actual modification of the Sales Agreement.

Exxon makes a strong argument that the element of reliance precludes certification of the class. Exxon argues that there is evidence in the record (and there is) that some dealers were not aware of the Discount For Cash program, some may not have been aware of the reduction in the wholesale price of gasoline, some may not have been aware of either. This Court is not persuaded that this argument precludes certification of the class for two reasons:

(1) The Eleventh Circuit has clearly suggested that where there are sufficient common and factual legal issues, the presence of the factual issue of individual reliance does not render the claims unsuitable for class treatment. *See Kirkpatrick, supra* at 724-725. *See also Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983).

(2) Even more importantly, Exxon's reliance argument is only appropriate on the question of whether or not the Sales Agreement was modified. As noted, *supra*, this Court finds that this is not a necessary prerequisite to the plaintiffs prevailing in this action or for certifying a class. Exxon cannot argue that the dealers, uniformly, did not rely on their Sales Agreements. Certainly, where two parties enter into a written contract, reliance on the part of each should be, and is, presumed.

[5] The extrinsic evidence is the actions taken by Exxon, not the retailers, which is alleged to be uniform and nationwide in nature.

Since this Court finds that it is possible for the plaintiffs to proceed in this claim even if they are unsuccessful in arguing that Exxon unilaterally modified the contract, individual reliance, in this case, is not a roadblock to certification of the class. While there is substantial evidence documented in this record that several dealers did not know about and/or did not rely on the specifics of the Discount For Cash program or the corresponding reduction in the wholesale price of fuel, there is no evidence in this record—and this Court would be shocked to find any—that the Exxon retailers did not rely on their Sales Agreement.

There is ample support for the proposition that, where the written documents exist (as they allegedly do in this case), the contents thereof "and the implications arising therefrom . . . ." leave for the court "as a matter of law to make the necessary determinations as to the impact thereof . . ." *See Allen v. Carlotti*, 400 F.Supp. 1037, 1042 (S.D. Fla. 1975), *affirmed*, 552 F.2d 1086 (5th Cir. 1977).

While defendant cites extensively in support of its position the case of *Brooks v. Southern Bell Telephone & Telegraph Co.*, 133 F.R.D. 54 (S.D. Fla. 1990), that case is substantially distinguishable from the *allegations* in the instant case. In declining to certify a class in *Brooks*, the court found that "each prospective class member's proof of the existence and terms of his contract, and any modifications thereto, will necessarily rest on different sources." *Id.* at 56. In the instant case, there is evidence to support that there is a standard contract and, as discussed, *supra*, proving a modification of contract is not necessarily a roadblock to plaintiffs' claim herein.

Additionally, under the Uniform Commercial Code, Exxon has an obligation to price in "good faith." *See* U.C.C. § 2-305(2). The pertinent section of the Uniform Commercial Code relied upon by the plaintiffs has been enacted in forty-nine of the fifty states, the District of Columbia, Guam, and

the Virgin Islands. While Louisiana has not adopted it, its Civil Code has similar language. That section of the code provides that there can be a contract with what is known as an "open price term", which is precisely what the Sales Agreement in the instant case contains.

U.C.C. § 2-305(2) states "a price to be fixed by the seller or by the buyer means a price for him to fix in good faith." Exxon argues that if it has an obligation to fix a price in "good faith", the dealers will have to show that Exxon's wholesale price was unreasonable in light of market conditions. This is a spurious argument if, indeed, plaintiffs can prevail on showing that Exxon agreed to reduce the wholesale price of fuel to "unbundle" the credit card processing charges, and then failed to do precisely that, which resulted in double charging to those dealers actually processing credit card claims. Market conditions are irrelevant to this issue.

Finally, the mere presence of factual difference will not defeat the maintenance of a class action if there are common question's questions of law. The rule provides that there need not be common questions of both law and fact but either will suffice. *See Pottinger v. City of Miami*, 720 F.Supp. 955 (S.D. Fla. 1989).

Therefore, when considering the commonality present by virtue of the Uniform Commercial Code, the standard Sales Agreement contracts, the alleged nationwide change in Exxon's position which was implemented on a national basis, and the alleged national failure of Exxon to comply, this Court concludes that for the purposes of this motion, the commonality requirement of Rule 23(a) has been satisfied.

TYPICALITY

In evaluating whether the plaintiffs have satisfied the requirement of typicality, a determination must be made whether the class representatives have the same essential

characteristics as the claims of other members of the class. *See Appleyard v. Wallace*, 754 F.2d 955 (11th Cir. 1985); *In re: Amerifirst Securities Litigation*, *supra*. The defendants have argued that there are factual distinctions between the plaintiffs herein and other class members and that there may be unique defenses applicable. Neither of these arguments necessarily defeats class certification. *See Appleyard*, *supra*; *In re: Amerifirst Securities Litigation*, *supra*. "A strong similarity of legal theories will satisfy the typicality prerequisite despite factual differences." *Kreuzfeld*, *supra*, at 600. Defendant's argument against typicality merely states that "proof of the claims of the named plaintiffs would not establish each class member's claim because proof of each class member's claims requires individual proof on a number of critical issues." (Pg. 28 of Exxon's Opposition to Plaintiffs' Motion for Class Certification). As noted, *supra*, and will further be discussed, *infra*, the Court rejects that argument.

A class representative's claim is sufficient to satisfy the typicality requirement if it arises from the same event or course of conduct that gives rise to the claims of the other class members and is based on the same legal theories. *See Kennedy v. Tallant*, *supra*; *Lawson v. Wainwright*, 108 F.R.D. 450 (S.D. Fla. 1986). It is sufficient to satisfy the requirement of typicality if there is a nexus between the class representative's claims or defenses and the common questions of law or fact which unite the class. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) *cert. denied*, 470 U.S. 1004, 105 S.Ct. 1355, 85 L.Ed.2d 387 (1985). As that court stated:

> "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation

> will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.

Id. at 1337.

Finally, "As long as Plaintiffs assert, as they do here, that Defendants committed the same wrongful acts in the same manner against all members of the class, they establish the necessary typicality." *See In re: Amerifirst Securities Litigation*, *supra*, at 429. In short, the evidence in this record supports that the plaintiffs' claims are typical of the claims of the class, thus satisfying the requirements of Rule 23(a)(3).

ADEQUATE CLASS REPRESENTATION

Rule 23(a)(4) requires that the named class representatives "fairly and adequately protect the interest of the class." *See Kirkpatrick*, *supra*, at 726. In determining adequacy of representation, the Court must first determine whether plaintiffs' counsel is qualified, experienced and generally able to conduct the proposed litigation. *Id.* Based on the record in this case, this Court has no problem concluding that plaintiffs are represented by competent and zealous counsel.[6]

So long as there is no antagonism between the interest of the class representatives and class members, adequacy of representation seems to fall more, in the Eleventh Circuit, on the focus of the attorneys. *See In Re: Alexander Grant & Co.*, *supra*. This is because the economics of a class action suit often cause greater financial interest to existing counsel than an individual member. *See Kirkpatrick*, *supra* at 727. *See also, Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Pottinger*, *supra*.

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[6] While this Court is aware of the untimely passing of one of the lead counsel for the plaintiffs, this Court does not find that unfortunate occurrence to change its position.

One area of this portion of the rule is of concern to the Court. One of the considerations in whether or not the representative parties will fairly and adequately protect the interest of the class is the ability and willingness to pursue the litigation with regard to possible costs of same. *See* e.g. *Brooks, supra; Powers v. Stuart-James Co., Inc.*, 707 F.Supp 499 (M.D. Fla. 1989).

Defendants have noted some question as to whether or not the plaintiffs have shown that they are able to fund the suit adequately. They have sought permission to solicit contributions from absent class members, suggesting limited means of funding the class. Plaintiffs' reply and surreply fail to challenge that allegation. The question therefore remains as to whether or not if the class is certified, the resources will be available so that this case can proceed in an orderly fashion. Accordingly, further information on this subject should be required by the Court prior to any class being certified. This Court finds, therefore, that plaintiff satisfies the necessary perquisites of the four elements of Rule 23(a) except as just noted, and would require further assurances regarding the cost factor prior to certification of a class.

RULE 23(b)(3)

In order to certify a class, the plaintiffs, in addition to satisfying the four elements of Rule 23(a), must also satisfy this Court pursuant to Rule 23(b)(3) "that the questions of law or fact common to the members or the class predominate over any questions affecting individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy." In order to meet this requirement, the class must satisfy a two-pronged test: predominance and superiority. That is, the questions of law and fact must predominate over individual questions and class must be superior to other avenues of litigation available.

This Court has already concluded that the predominance question has been satisfied in earlier discussion on commonality and typicality. This rule only requires that common questions predominate over individual ones—not that there is a complete absence of individual questions. *See Cox v. American Cast Pipe Iron Co.*, 784 F.2d 1546 (11th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). "[I]f the liability issue is common to the class, common questions are held to predominate over individual questions." *See In Re: Amerifirst Securities Litigation*, *supra* at 434.

Defendant has strenuously argued to support its position that individual questions predominate over the common ones. In that regard, among other things, Exxon turns to its affirmative defenses.[7] Exxon first raises the issue of the statute of limitations. Potential defenses of the statute of limitations do not necessarily defeat the availability of a class action. *See Kennedy*, *supra*. As noted, earlier, the merits of the plaintiffs' claim are not an appropriate consideration in this motion. There is support in the Southern District of Florida for the proposition that the question of whether or not a claim is barred by the statute of limitations goes to the merits of the claim and is therefore not appropriate consideration on the issue of class certification. *See CV Reit, Inc. v. Levy*, 144 F.R.D. 690 (S.D. Fla. 1992).

Exxon raises the question of dealers having signed releases. While, giving defendant the benefit of the doubt, that this does raise some individualized questions, this Court finds that issue, in and of itself, insufficient to defeat certification.

Two cases are heavily relied on by the defendant on this issue. In *Abercrombie v. Lum's, Inc.*, 345 F.Supp. 387 (S.D.

[7] Exxon's affirmative defenses have not actually been pled yet since Exxon has not yet filed an answer. However, for purposes of this motion, they will be considered.

Fla. 1972) the court declined to certify a class. Factually this case involved vastly different circumstances than the instant case. On the issue of releases the court noted over 127 general releases. The court indicated that individual examination of those releases and the intent of the parties mitigated against the certification of the class. In *Plekowski v. Ralston Purina Company*, 68 F.R.D. 443 (M.D. Ga. 1975) the court noted, as a factor weighing against class certification, "several hundred class members. who have executed releases of varying types. . .". *Id.* at 451.

Both cases are easily distinguishable on two bases:

(1) The evidence in this case is that there are only a couple of variations of a basically standard release used by the defendant, and;

(2) In those cases, the release problem was only one of several weighing against class certification.

This court finds persuasive the case law dealing with satisfaction of claims and agreements to arbitrate. There is case law supporting the fact that if some of the parties have signed agreements to settle or, on another front, agreements to arbitrate, they are not bases for denying class certification. *See* e.g. *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *affirmed* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), *reh'q denied* at 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1980). *See also Kirkpatrick*, *supra* at 725 (the presence of an arbitration agreement in some of the contracts with prospective class members does not eliminate the possibility of proceeding with the class action). Accordingly, while the release defense may present some individualized questions, this Court does not find that this predominates so as to defeat class certification.

It is appropriate, at this time, to further address the issue of unjust enrichment. In order to prevail on a claim for unjust enrichment, as apparently agreed to by both parties, the

requirements are: (a) a benefit conferred upon the defendant by the Plaintiff; (b) appreciation by the defendant of the benefit; and (c) acceptance of the benefit by the defendant under circumstances that make it inequitable for him to retain the benefit without paying the value thereof. *See* e.g. *Craig W. Sharp, P.A. v. Adalia Bayfront Condominium, Ltd.*, 547 So.2d 674 (Fla. 2d DCA 1989). Exxon correctly states that the tests will be to include "whether Exxon has been unjustly enriched at the expense of each dealer either (i) because Exxon allegedly charged *each* dealer *twice* for credit card processing . . . or (ii) because Exxon accepted increased sales volume as a result of each dealer's participation in the DFC program." The problem with Exxon' s argument is it seeks to focus the unjust enrichment burden (from the standpoint of proof) on each individual dealer. However, as correctly argued by the plaintiffs, the focus of the unjust enrichment claim is on Exxon. The plaintiffs need not prove whatever it is that the plaintiffs have done, other than proving that they conferred a benefit upon Exxon—by being double charged or by paying in excess of the "seller's established price appropriate for the transaction." Thereafter, the focus is on Exxon and not on the dealers. This Court does not find that this issues.[8]

Finally, the voluminous litigation in this case (which is still at the Motion to Dismiss stage—there having been no answer filed by the defendants) is ample proof, standing alone, that this case is appropriate for class action treatment. "Rule 23 [and the policy behind its creation] is to be preferred to premature speculations about draconian case management." *Coleman*, *supra* at 520. While it is possible that multiple

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[8] Exxon argues, without authority, that "the elements of a claim for unjust enrichment differ from state to state . . ." (Footnote 9, page 8 of Exxon's Sur-Reply). However no showing has been made that, given the focus on Exxon and not the plaintiffs as discussed, supra., that the differing state laws make any difference.

individual actions could occur, they would be far less economical and far more burdensome than a class action.

Under Rule 23(c) the court may amend or alter the definition of the class at any time prior to rendering a decision on the merits. *See Pottinger*, *supra* at 960. The court may modify the class or create sub-class, even after certification occurs. *See Cox*, *supra* at 1553. Even in doubtful cases or when a question exists, the benefit of the doubt should sway in favor of certifying the class, if for no other reason that the fact that decertification is always possible. *See Coleman*, *supra* at 530. The interest to the class members in individually controlling the prosecution of separate actions is minimal in the present litigation. This, however, is supportive of the preference of a class action.

Even if, as alleged by the defendants, because there is a minimum requirement for an amount in controversy, these cases are subject to individualized prosecutions (or even group prosecutions), the volume of the litigation in this case, alone, stands as a strong and sturdy column to support a class action in this matter as being much the preference over numerous cases throughout the country.

RECOMMENDATION

It is therefore recommended that Plaintiffs' Motion to Certify the Discount For Cash class be GRANTED subject to further inquiry into the ability of the class to handle the costs and expenses of litigation. Indeed, plaintiffs themselves note "the costs and expenses of each class member suing one of the largest corporations in America are prohibitive . . . " (Pg. 18 of plaintiffs' revised memo in support of class certification). Therefore, this Court would require the plaintiffs to readdress the cost factor (giving the defendants an opportunity to respond) prior to class certification.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND ORDERED this 10th day of August, 1994 at Miami, Florida.

/s/ [illegible]
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX P

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986 CIV KEHOE

ALLAPATTAH SERVICES, INC., a Florida corporation, *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION, a New Jersey corporation,
Defendant.

REPORT AND RECOMMENDATION

THIS MATTER is before this court on the motion of the Defendant Exxon Corporation to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction (D.E. 296). This court has considered the motion, the response, the reply, the appendices submitted by the defendant, the exhibits filed by the plaintiff, and all other matters pertinent to the resolution of this matter. Additionally this matter was briefly discussed at a hearing which took place on Thursday, June 9, 1994.

FACTS

The plaintiffs herein are seeking to establish a class action against defendant Exxon Corporation. The basis for the claims (as it pertains to this motion) is that Exxon breached a contract with the plaintiffs (or in the alternative became unjustly enriched at plaintiff's expense), and all of this came about by failure to lower the wholesale price of fuel at a point in time when plaintiff's allege Exxon was obligated to do so.

The Motion to Dismiss is based upon defendant's contention that, this matter cannot be certified as a class action, because each class member must individually have at least $50,000.00 in controversy pursuant to the diversity jurisdiction of this court under 28 U.S.C. § 1332. The defendants contend that since there are proposed members of the class that would have claims below the minimum jurisdictional amount, this court lacks subject matter jurisdiction to consider this matter. Defendant claims that "[U]nder the circumstances, the court lacks subject matter jurisdiction over the class action claims even if the jurisdictional allegation of the Amended Complaint is construed to allege that *each* class member has claims in excess of $50,000.00." (page 8 of defendant's Memorandum in Support of Motion to Dismiss).

DISCUSSION

Plaintiffs have brought suit under the diversity provisions of the U.S. Code. Accordingly, pursuant to 28 U.S.C. § 1332(a) this court only has jurisdiction where the matter in controversy exceeds the sum or value of $50,000.00. However, plaintiff alleges that because this court has jurisdiction over *some* of the cases, there is additional jurisdiction over the remaining cases pursuant to 28 U.S.C. § 1367 [supplemental jurisdiction].

The leading case on the issue of subject matter jurisdiction under facts similar to these is *Zahn v. International Paper Company*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Defendant cites this case for the proposition that a class cannot be certified if all members do not exceed the minimum jurisdictional amounts. This court agrees with that analysis. However, defendant attempts to cite this case for the further proposition that because there may be prospective members whose claims do not exceed the minimum jurisdictional amounts the case should be dismissed for lack of subject matter jurisdiction. With that reasoning, this court disagrees.

A careful reading of *Zahn* suggests that it stands for the proposition that each plaintiff in a class action founded on diversity must exceed the minimum jurisdictional limits of 28 U.S.C. § 1332. It does not hold that a class cannot be certified (as alleged by the defendant) as a class made up of those persons whose claims do exceed the minimum jurisdictional amount. It supports defendant's position only in the factual situation where only the named plaintiffs can show damages in the jurisdictional amount.

Zahn clearly indicates that "the entire case must be dismissed where *none* of the plaintiffs claims more than $10,000.00[1]. . ." 414 U.S. at 300, 94 S.Ct at 511. However, where some of the plaintiffs do allege that the minimum jurisdictional amount is satisfied, the court also requires "that any plaintiff without the jurisdictional amount must be dismissed from the case even though others allege jurisdictionally sufficient claims." *Id.* This obviously infers that those with valid claims can proceed. There is a significant difference between dismissal of the case where none of the plaintiffs has the sufficient jurisdictional prerequisites, and dismissing the individual litigants where some of them have jurisdictionally sufficient claims. In summary the court found that "[E]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . ." *Id.* at 301; see also *In re: School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990). Therefore this court finds that there is no basis to dismiss the case on the lack of subject matter jurisdiction argument allegedly (according to defendant) supported by *Zahn*.

This court next addresses plaintiffs' argument that class members may be included even if the subject matter amount

[1] That was the minimum jurisdictional amount at the time of the 1973 decision.

of their claim is below the requirement of 28 U.S.C. § 1332 based on the Supplemental Jurisdiction law more recently enacted (more recently than *Zahn*).

28 U.S.C. § 1367 provides that in cases where federal district courts have original jurisdiction, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . ." 28 U.S.C. § 1367(a). As opposed to creating a new basis for jurisdiction as alleged by the plaintiffs, it has been held that "with regard to pendent jurisdiction in diversity cases as opposed to 'federal question' cases, the legislature simply codified and made clear, existing case law. See *C.D.S. Diversified, Inc. v. Franchise Finance Corp. of America*, 757 F.Supp. 202 (E.D. N.Y. 1991). As that court noted, the supplementary jurisdiction law which became effective in 1990 did not change the requirements as noted in *Zahn*, *supra.*, that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in federal courts" (414 U.S. at 294, 94 S.Ct. at 508). This court cited, with approval, Moore's Federal Practice in stating "it has been observed that pendent-party jurisdiction is no longer viable under the current state of the law in a case where the amount in controversy is below the required jurisdictional amount or where diversity of citizenship is absent." *C.D.S. Diversified, Ins., supra.* at 205-206. Other courts have reached similar conclusions. In Massachusetts a district court held "that the statute [28 U.S.C. § 1367] was not intended to effect the jurisdictional requirements for diversity class actions set forth in *Zahn*". See *Mayo v. Key Financial Services, Inc.*, 812 F.Supp. 277 (D. Mass. 1993). Inferentially the same decision was reached in the case of *Meredith v. Schreiner Transport, Inc.*, 814 F.Supp. 1001 (D. Kan. 1993). That court refused to exercise pendent jurisdiction over a state claim because the amount in controversy was below the required minimum under 28 U.S.C. § 1332.

Therefore it is the opinion of this court that plaintiff may not add parties to the class (in the event a class is certified) unless those parties have claims which comply with the minimum jurisdictional amounts of 28 U.S.C. § 1332.

Finally this court finds that under the liberal rules of pleading in Federal Court, the jurisdictional allegations suffice. Paragraph one of the complaint is dissected with microtweezers by the defendant in an effort of obfuscate the obvious—it is alleged that each plaintiff satisfies the required monetary jurisdictional prerequisite. This fact remains true notwithstanding defendant's unsubstantiated smokescreen on page 6 of its memorandum.

As to the sufficiency of the evidence on subject matter jurisdiction, there is evidence in the record, sufficient at this stage of the pleadings, to show that at least some of the plaintiffs exceed the minimum jurisdictional amount. No allegation has been made that plaintiff is required, at this stage of the lawsuit, to list each plaintiff satisfying the minimum jurisdictional amount, much less prove those allegations. There is however, law suggesting to the contrary. See e.g. *In re: School Asbestos Litigation*, *supra.*; *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Defendant constantly, no matter the particular motion, weaves its argument to the class certification issue and this argument is no exception. This motion deals with jurisdiction and not manageability, feasibility or viability of certifying a class. If two of the named plaintiffs have claims in excess of the jurisdictional amount, this court *has* subject matter jurisdiction. If a class is not certified, those named plaintiffs who qualify can still proceed with a cause of action as individual or joined plaintiffs. Defendant actually appears to concede as much. (See footnote 4, page 8 of defendant's reply brief).

RECOMMENDATION

Since we are dealing with defendant's Motion to Dismiss this case for lack of subject matter jurisdiction it is respectfully recommended that said motion be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable James W. Kehoe, Senior United States District Judge for the Southern District of Florida. Failure to fi objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte, v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.Ct 397 (1988).

DONE AND ORDERED this 21st day of June, 1994 at Miami, Florida.

/s/ [illegible]
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX Q

STATUTORY PROVISION

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

APPENDIX R

APPELLATE PROCEDURE RULE

Fed. R. Civ. P. 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Member-ship in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily

understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be

given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request

exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to repre-

senting the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and,

for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)